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CONVEYANCER'S NOTEBOOK.

Settlements—reform of the Settled Land Act.—Attention may be called to the article by Professor Malcolm Lewis in the *Law Quarterly Review* for October of this year on the difficulty arising in small estates by the operation of the Settled Land Act. In his wide experience of conveyancing Professor Lewis has noticed that much hardship is caused in small estates by the effect of the Settled Land Act requiring the execution of repeated vesting deeds on the death of successive owners, complicated, as the law is, by the requirement of settled land grants. No attempt to elaborate the theme is necessary here, since the article should be read as a whole, except to say that in a general way the remedy offered by Professor Lewis is to vest the legal estate in the trustees from the creation of the settlement. The trustees will, therefore, have the power to convey, though the control of the powers is to remain vested in the tenant for life in conformity with the principles generally accepted by Settled Land Act.

The effect of the Property Legislation of 1925 was virtually to abolish the trustee with a power of sale in favour of the estate owner or the trustee for sale. The proposals put forward would have the effect of reinstating him. The writer of the note has elsewhere expressed the opinion that the trustee with power of sale ought to have been employed instead of the statutory trustee for sale. The difficulty of notice could have been overcome by a section analogous to the Settled Land Act, s. 110. If the reform adumbrated, which has much to commend it if we may respectfully

say so, is brought in we would suggest that it might be used to replace the statutory trust for sale, which has already produced a number of anomalies. In fact by this means it might become possible largely in practice to avoid the present difficulty arising from the alternatives of trust for sale and settled land, another complicated question as the note on *Re Sharpe's Release* (*ante*, p. 78) indicates. We would commend to all our readers a careful study of Professor Lewis's article.

London—land for Green Belt—powers.—The Green Belt (London and Counties) Act, 1938, is a private Act and so not normally within the scope of these columns, but it may affect so many members of the profession and is so interesting on general grounds that brief reference may here be made to it. The counties affected by the Act are Buckingham, Essex, Hertford, Kent, London, Middlesex and Surrey, and the County Boroughs of Croydon, East Ham and West Ham: section 2 (1). The expression "owner" includes a person (other than a mortgagee *not* in possession or a lessee the unexpired term of whose lease is less than twenty-one years) who is for the time being entitled to a legal estate in land within the Law of Property Act, 1925, s. 1 (1).

The purpose of the Act is to establish a Green Belt round London and it shall always have been lawful (*a*) for an owner by deed entered into with a local authority to declare that land is part of the Green Belt and enter into any restrictive covenants for the purpose; (*b*) for a local authority to treat land vested in it in the same way; and (*c*) by agreement to acquire whether by purchase, gift, lease, exchange or otherwise any land within the area: section 3. A lessee, however, cannot do this without the consent of the person entitled to the reversion on the lease: *ibid.* A tenant for life for the purposes of the Settled Land Act (presumably including a statutory owner) has an additional power under that Act but cannot act without the consent of the Court or the trustees of the settlement, and similarly trustees for sale must obtain the consent of the Court or all the beneficiaries *sui juris*, and any money arising is capital money: section 19. The Act does not seem to be clear whether these limited owners can make a gift of the land, though they clearly have the power to enter into restrictive covenants. Charity trustees similarly have power under the Act, but where it is at variance with the trust they must obtain the consent of the Court or Charity Commissioners or any person who has power under the trust instrument to vary the trust:

section 30. Section 84 of the Law of Property Act, 1925, does not apply, so that any covenants entered into under the Act may not be modified : section 22 (2).

Where Green Belt land is retained by a private owner he may enter into a contract that in the event of a sale he shall give the local authority a first offer at a price to be fixed under the terms of the contract : section 18. The purpose of this section is to prevent the option to purchase being invalid for perpetuity.

The remainder of the Act is primarily concerned with regulating the purposes for which Green Belt land can be acquired by local authorities and statutory undertakings, as, for example, for highways and sewers, and regulating exchanges of land. One interesting provision is that, if land is compulsorily acquired, *e.g.*, for a highway, where it is vested in a local authority or parish council, the restriction is not to be taken into account in assessing compensation : section 9. There does not appear to be an analogous provision for private owners.

Without the consent of the Minister of Health no building, other than one ancillary to the purposes for which the land is used, may be erected on the land : section 10.

There are further regulations concerning the machinery on acquisition by deposit of plans with the Minister of Health, etc. : section 4; and stringent restrictions on land vested in local authorities : section 5.

It is thought that where a private owner enters into a deed of covenant this would require to be registered under the Land Charges Act, 1925, in order to be binding upon a purchaser. In practice, no doubt, the Act will be of importance primarily in transactions with local authorities.

Lessees and the freehold title—constructive notice.—With reference to the problem raised by a correspondent in the last number (see p. 5) concerning the position of lessees if they do not investigate a lessor's title, Dr. E. O. Walford has drawn our attention to his detailed consideration of the problem in Volume 2, pp. 135—137, 138. He writes : " On p. 138 I said : ' It would be difficult to satisfy a client that his interests had been reasonably protected if after payment of say £1,000 for a lease of a house for 99 years at a ground rent, it was found that the lessor had no title. The explanation that " under the usual form of contract and even under an open contract the lessee is not entitled to call for the title to the freehold reversion " could hardly be regarded

as a sufficient reply'. I indicated that it was not clear whether such an answer to the purchaser would be sufficient in an action for negligence, having regard to the decision in *Imray* v. *Oakshette*. Although that was a case of an underlease the observations of Rigby, L.J., to the effect that the intending tenant should stipulate for the reversionary title appears to me to be applicable where the lease is to be granted out of the freehold."

Attention may also be called to Dr. Walford's book on *Draft Leases*, pp. 60, *et seq.*

If we may say so the problem raised by our correspondent involves two separate issues which must not be confused.

The real province of section 44 (8) of the Law of Property Act, 1925, is the equitable doctrine of notice. That doctrine is much modified by the Land Charges Act, and any interests registered under that Act do not normally depend for their effectiveness upon the equitable doctrine of notice, since a purchaser has actual notice: see section 198 of the Law of Property Act; *Re Forsey and Hollebone's Contract*, [1927] 2 Ch. 379. It is an open question, in the opinion of the writer of this note, whether section 44 (8) includes protection in the case of these registrable charges, though the provision that the purchaser will not have notice unless he actually investigates the title does seem to point to the fact that though by section 198 he has actual notice, the more precise words of section 44 (8) exclude notice wherever the doctrine of equitable notice arose prior to 1926. This view may not appeal to the Court because it would operate as a restriction on the effect of the Land Charges Act wherever a lease was validly granted by a legal estate owner. For example, if A, the owner in fee simple, has registered against him certain restrictive covenants and then conveys to B, B, of course, takes subject to the restrictions. If B then grants a lease to C, any restrictions not contained in the lease would not bind C since he would not know of A and consequently would not search against him. The position would appear to be different in registered land: *White* v. *Bijou Mansions*, [1937] Ch. 610 (noted *ante*, vol. 2, p. 69, 71, and discussed by Dr. Walford at p. 135), and the learned Judge in that case took the opposite view of the effect of section 198 to that expressed here; but, of course, his observation was by way of a *dictum*, because the decision turned more specifically upon the precise wording of the Land Registration Act, 1925. Whatever view, however, is taken of the relation between section 44 (8) and section 198 the fact remains that it concerns only the question of protection against equitable interests where the lessee takes a legal estate in the term purported to be granted. This protection, such as it is, is

afforded equally to a mortgagee of such lessee, since "purchaser" in the sub-section must, it is conceived, include mortgagee: Law of Property Act, s. 205 (1) (xxi).

It may be added that a difficult question could arise, if the interpretation of the effect of section 198 suggested here were adopted, in the case of a registered puisne *legal* mortgage. It would seem, however, that since the mortgagee has the legal estate as well as being registered he would have priority because the doctrine of equitable notice does not arise. If the puisne mortgage was unregistered the question falls because the Land Charges Act, s. 13 (2) renders such a mortgage void as against a purchaser, which, of course, includes a lessee.

Where section 44 (8) does not afford any protection is where the lessor, from some defect in title, does confer upon the purported lessee any legal term of years. Here the lessee is not a *bona fide* purchaser of the legal estate and enjoys no protection against any interests, legal or equitable, except unregistered transactions under the Land Charges Act, s. 13 (2). This is the second aspect of the problem raised by our correspondent and involves quite separate considerations. For example, if a lease were made by an estate owner under the Settled Land Act, 1925, which did not comply with the Settled Land Act, *e.g.*, because the fine was not paid to the trustees of the settlement, the lease would apparently be void: Settled Land Act, s. 18. Against this contingency the Law of Property Act provides no relief and its provisions relating to open contracts seem unreasonable. Consequently, where an intending lessee intends to spend money by way of fine or building on taking a lease, or even in the assignment of an existing lease, it would appear highly desirable, as indeed is not uncommonly done, to insist on some evidence of the title of the lessor to grant the lease. In the writer's opinion the position is, frankly, very unsatisfactory, though in practice it does not seem to work much hardship.

It is in this connection that registered titles under the Land Registration Act show to the best advantage against unregistered conveyancing, particularly in areas where registration is compulsory. If registration is compulsory all leases over twenty-one years will automatically give rise to the question of registration, the Registry would not accept an invalid lease, and no difficulty need ever be made of a preliminary investigation of the lessor's title which is short and simple. In the writer's opinion the strongest argument for compulsory registration, though not so frequently advanced, is the unsatisfactory position in practice of title to leases.

Mortgage—payment off—title of mortgagor.—A correspondent raises another problem, this time connected with mortgages. A mortgaged to B and then died. A's beneficiary C continued to pay interest to B through his solicitors who knew the facts. Subsequently B's mortgage was assigned from time to time until it came into the hands of D, who employed other solicitors who had, however, knowledge of the facts and received the interest. C, wishing to pay off the mortgage, arranged to do so on the following basis : deeds to be handed over in exchange for capital and interest, and the discharge to be prepared after C's solicitor had looked into the title. The money was forwarded with a request for the deeds. D's solicitor, however, retained the deeds and raised questions as to C's title requiring probate, etc. Our correspondent raises the question whether D's solicitors can require title, and suggests that D is sufficiently protected by the Law of Property Act, s. 96 (2). Section 96 (2), as amended by the Law of Property Act, 1926, provides that a mortgagee is not liable for delivering the title deeds to a person not having the best right to possession thereto unless he has notice of a person having a better right thereto whether by virtue of a right to require surrender or reconveyance or otherwise, and notice does not include notice implied by reason of registration under the Land Charges Act or a local deeds registry. The section, however, only applies to a mortgagee " whose mortgage is surrendered or otherwise extinguished ". The section is not easy to construe, because it would appear that if the payment of the principal and interest was by a person who had no right to require surrender, *i.e.*, in whom the equity of redemption was not vested, it is doubtful whether the mortgage would be extinguished. It has, however, been held that a person with an interest in the equity of redemption has the right to redeem, though he is not entitled to the equity of redemption, *e.g.*, a lessee : *Tarn* v. *Turner*, 39 Ch. D. 456.

It is, of course, familiar law that a mortgagee owes a duty not to hand over deeds to an unauthorised person because they form part of the mortgaged property : see *Gilligan* v. *National Bank*, [1901] 2 Ir. R. 513 (see Hanbury, Mortgages, p. 141). In the case under discussion, however, there appears to be another point not raised by our correspondent. Where a receipt is endorsed on the mortgage for the capital and interest, the normal form of discharge, and the money appears to have been paid by a person who is not entitled to the immediate equity of redemption, the receipt operates as a transfer, unless (i) it is otherwise expressly provided, or (ii) the mortgage is paid out of capital money in the hands of a personal representative or trustee properly applicable

for the discharge, and it is not expressly provided that the receipt is to operate as a transfer. Even if there is no evidence of C's title, therefore, it would appear that a receipt in favour of C would operate as a transfer, which is a legitimate transaction and would entitle the mortgagee to hand over the deeds. Of course, if the mortgagee had notice of a subsequent incumbrancer and had reason to believe that C was entitled to the equity of redemption, then he might properly refuse to part with the deeds without reference to the subsequent incumbrancer, though no doubt in normal cases such incumbrancer would be protected by registration under the Land Charges Act. In the absence of such notice it is difficult to see how the mortgagor could be liable for handing over deeds to a person who would either be entitled to the equity of redemption or alternatively become a transferee of the mortgage. His title to a surrender in such circumstances does not seem to arise.

Faculty—illegal ornaments.—Since reference was made in the last number in these columns to *Re St. Hilary* (p. 5) it may be convenient to call attention to the decision on appeal to the Court of Arches: *Re St. Hilary*, [1938] 4 All E. R. 147. The most substantial variation of the order made on appeal was in respect of the six altars in the church, all of which were of stone. In the Court below it was held that all the altars were illegal *per se*. Mr. W. N. Stable, K.C. (now Stable, J.), acting for the Dean of Arches, held that as long as there was a "holy table" made of wood, it might be legitimate to have other altars made of stone provided that they did not usurp the place of the communion table. Hence he held that while what had been called the "high altar" must be removed, it was in the discretion of the Chancellor to permit the retention of the remaining altars. The learned Judge expressly entered a caveat against being held to have decided that the holy table must be moveable. The judgment is also of some importance with reference to the granting of faculties for "aumbries" where the Sacrament could be reserved. He refused to lay down whether in all cases they were illegal, though in this case he directed removal.

The judgment as a whole is of considerable interest as representing the difficulties presented where ornaments or decorations are to be introduced into a church. It also emphasises the importance of obtaining a faculty from the consistory Court before introducing any such ornaments. It is felt that many churchwardens act, or allow the incumbent to act, without giving adequate

thought to the consequences. In the light of the recent Faculty Jurisdiction Measure (see *ante*, p. 3), practitioners may do well to draw their clients' attention to the position.

Nationalisation of land law—Coal Act.—Attention may be drawn to the revolutionary principle in Land Law introduced by the Coal Act, 1938. This Act affects practitioners generally and not only those concerned with coal mines. In view of the importance of the principles involved we have given to it an article appearing later in this volume.

Compulsory registration of title—Croydon County Borough.—Readers are reminded that as from January 1, 1939, compulsory registration of title under the Land Registration Act, 1925, applies to the County Borough of Croydon.

PUBLISHERS' NOTICE.

Readers will observe that this number is larger than usual. It was felt that all the forms under the Hire-Purchase Act, 1938, should be included in one number, and there are in consequence an extra sixteen pages of forms. To compensate for this the precedents section will be slightly shortened in the next number.

In addition there are eight extra pages in the journal, despite which a number of notes of cases have had to be held over.

RECENT LEGISLATION.

1. *INHERITANCE (FAMILY PROVISION) ACT, 1938.*

By S. J. Bailey, LL.M., Barrister-at-Law.

The Inheritance (Family Provision) Act, 1938, does not come into operation until July 13, 1939. Nevertheless, its contents merit immediate consideration. It will enable the High Court, when of opinion that a will does not make reasonable provision for the maintenance of a "dependant" of the testator, to order that such reasonable provision as it thinks fit shall be made for that purpose out of the testator's net estate. "Dependants" of a testator, for the purposes of the Act, are (i) the testator's wife or husband, (ii) a daughter who has not been married, (iii) an infant son, (iv) any son or daughter who is, by reason of mental or physical disability, incapable of maintaining himself or herself. Moreover, a child adopted by the testator, by adoption order under the Act of 1926, ranks as a son or daughter for this purpose. The Act applies only when a testator dies domiciled in England, after the commencement of the Act, leaving a will and one or more such "dependants".

Maintenance can be ordered out of capital if the net estate does not exceed £2,000 [section 1 (4)]; otherwise, it must take the form of periodical payments of income [section 1 (2)]. The order must prescribe when these payments are to cease. At the latest, they must cease when the "dependant" dies, and in the case of (i) testator's spouse, on re-marriage, (ii) testator's daughter, on marriage or cesser of her disability, whichever is the later, (iii) testator's son, on reaching full age or cesser of his disability, as the case may be. In making an order under the Act, the Court may impose conditions or restrictions [section 1 (1)], and may give such consequential directions as it thinks fit [section 3 (2)]—save that no larger part of the estate may be set aside than is sufficient, at the date of the order, to produce the desired income. After the order has been made, the testator's will is to be regarded (even for purposes of death duties) as though any variations made by the order were part of the will when he executed it [section 3 (1)]: accordingly, an office copy of the order must be filed at the Principal Probate Registry, and a memorandum of it

endorsed on or permanently annexed to the probate of the will or the letters of administration with the will annexed.

Although, in the main, the Court has an unfettered discretion when deciding whether to make an order for maintenance in favour of a "dependant", and what sum to award, the Act prescribes certain limits. (1) First, no application for maintenance can be made by anyone if the testator "bequeathed not less than two-thirds of the income of the net estate" to his or her surviving spouse, unless the testator's "dependants" include children by some former spouse [section 1 (1)]. This provision appears to apply even to bequests of income for a limited period; and cases may be imagined in which it may operate harshly upon dependent children. Thus, if a testator bequeaths all his property to a charity subject to a life interest for his widow, it would seem that his children cannot apply for maintenance even though the widow dies immediately after him. Nor is it certain that a surviving spouse, who holds the income of the deceased's estate, will use any part of it for the proper maintenance of their dependent children. (2) A second limit imposed by the Act [section 1 (3)] appears to be founded upon the old Statutes of Distribution. If the testator leaves both a spouse and other dependants, no order may be made whereby his dependants together obtain (by virtue of the order and his will combined) more than two-thirds of the annual income of his net estate; but if he leaves no spouse, or if his spouse is the only "dependant", the maximum fraction is one-half. And the Court must "give effect to" the same "principle" even when maintenance is ordered out of capital (*i.e.*, where the net estate does not exceed £2,000: section 1 (4)). (3) A third restriction is the very short period of limitation which the Act prescribes [section 2 (1)]. No application for maintenance can ordinarily be made except "within six months from the date on which representation in regard to the testator's estate for general purposes is first taken out". To this there are [section 4 (1)] two exceptions: (i) application for an order to vary a previous order on grounds of non-disclosure or of substantial change in the circumstances of a dependant or legatee; (ii) applications for an order for maintenance out of property from the income of which another dependant is already being maintained. These exceptions, however, are restricted to property from which some dependant is already receiving maintenance—whether by virtue of a previous order under the Act or (*semble*) by a provision of the will. Consequently, as soon as the normal period of six months has elapsed, one can be certain that no application under the Act can divert to the testator's dependants any further property from his

estate; such applications can only divert it *from* them, or adjust between them income which one or other of them is already enjoying. Incidentally, it may be noted here that dependent children include a child who is *en ventre sa mere* at the date of the testator's death [section 5 (1)]. Presumably it will sometimes be necessary to apply for maintenance on behalf of such a child before he is born; for, if the period of limitation expires before his birth, he will be limited to property which is already maintaining other dependants; and if the only other dependant is the expectant mother, and she dies in childbirth, it seems that he will have no claim at all. (4) Finally, the Act is restricted to cases where a testator dies, domiciled in England, *leaving a will* [section 1 (1)]; and the "net estate", from which the Court may order maintenance, means all the property (less debts, expenses and estate duty) of which he had power to dispose by his will, other than by virtue of a special power of appointment [section 5 (1)]. The precise significance of the words "leaving a will" is not explained (save that "will" includes codicil: section 5 (1)). They appear to mean that the Act applies unless the testator died wholly intestate; apparently, therefore, by analogy to decisions on the Intestates' Estates Act, 1890, any duly executed will or codicil which is not entirely devoid of effect will enable the Act to apply—even, perhaps, if the only effective provision is an appointment of executors or of a testamentary guardian. If this be the case, it follows that the Act, though inapplicable if there is no will at all, may apply where a valid will exists which fails to dispose of the deceased's estate. It is therefore difficult to see any logical reason why the benefits of the Act are withheld from the dependants of one who dies completely intestate. It is true that any "dependant" will usually benefit under the intestacy rules; but those rules (unlike the provisions of this Act) do not extend to adopted children, nor do they give special preference to a child who is an infant or a spinster, or who is incapable of maintaining himself.

Three sub-sections of the Act describe those matters to which the Court "shall have regard" in the exercise of its discretion to order maintenance thereunder. They are (i) the nature of the property representing the testator's estate [section 1 (5)]—in particular no order is to be made which will necessitate an improvident realisation of such property; (ii) any past, present or future capital or income of the dependant, whatever its source may be; his conduct "in relation to the testator and otherwise"; and any other matter which the Court considers material [section 1 (6)]; and (iii) the testator's *reasons*, so far as ascertainable, for making the dispositions contained in his will, or for not

making any provision (or further provision) for the dependant in question [section 1 (7)]. In relation to this last line of inquiry, it is important to observe that "the court may accept such evidence of those reasons as it considers sufficient, including any statement in writing signed by the testator and dated"; but, when assessing the weight, if any, to be attached to such written statements, the Court is required to "have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement". (*For Forms of Wills and Statements*, see *post*, pp. 493, 497.)

In those Dominions in which legislation similar to this Act is already in force, experience has shown the difficulties which beset a Court clothed with such wide discretion in the exercise of which so many matters must be weighed. A case in point is the recent decision of the Privy Council in *Bosch* v. *Perpetual Trustee Co.*, [1938] A. C. 463, where, *inter alia*, it was held (pp. 478-9) that "in every case the Court must place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband or father". Presumably clients who are made aware of the contents of this Act will be anxious to avoid the expense and publicity of *post mortem* applications for maintenance. In future, therefore, the delicate task of advising a reluctant client to deal justly with his dependants will be lightened; for the onus of such advice can now be placed upon the Act. Where, however, the client insists on leaving little or nothing to one of his dependants, it will be well to ensure that cogent evidence exists that he has reason for so doing. Should his reasons be derogatory of that dependant it would seem preferable to preserve them in a written statement signed by him and dated [section 1 (7)] rather than to insert them in the will. Moreover, whether the statement of his reasons is contained in the will or in a separate document, it may be desirable that evidence supporting its accuracy should be preserved with it (*ibid.*). Such precautions may serve to minimise the risk of ill-founded applications under the Act.

Finally, it should be observed that the Act applies to all testators who die after its commencement (*viz.*, July 13, 1939), though their wills may have been made long ago. At least six months remain, therefore, in which to make any necessary alterations in wills already executed or to obtain from testators signed statements justifying the dispositions they have made.

2. *THE HIRE-PURCHASE ACT, 1938.*

By H. Edmund Davies, LL.D., B.C.L.,
of the South Wales Circuit, Barrister-at-Law.

I.—Introductory.

The statute 1 & 2 Geo. 6, c. 53, which comes into force on January 1, 1939, is intituled "An Act to amend the law with respect to the hire-purchase and sale upon credit of goods and the law of distress in relation thereto". The need for drastic amendment of this branch of the law had long become abundantly clear, for prior to the passing of the Act the abuses which had crept into hire-purchase business and the devices resorted to by unscrupulous firms were of such a character that what should, properly regulated, be a valuable system to many persons who would otherwise experience some difficulty in obtaining credit had become a means whereby the ignorant and unwary were involved in commitments the nature of which they did not properly understand and which were often hopelessly beyond their means to discharge.

II.—To what Agreements the Act Applies.

The Act deals with two types of contract, (1) hire-purchase agreements, and (2) credit-sale agreements. A "hire-purchase agreement" is defined (section 21 (1)) as—

> "an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee, and where by virtue of two or more agreements, none of which by itself constitutes a hire-purchase agreement, there is a bailment of goods and either the bailee may buy the goods, or the property therein will or may pass to the bailee, the agreements shall be treated for the purposes of this Act as a single agreement made at the time when the last of the agreements was made".

By a "credit-sale agreement" is meant—

> "an agreement for the sale of goods under which the purchase price is payable by five or more instalments".

In some degree, these definitions follow and embody the decisions in *Helby* v. *Mathews*, [1895] A. C. 471, and *Lee* v. *Butler*, [1893] 2 Q. B. 318. In the former case, the owner of a piano let it out on hire under an agreement whereby, on payment of the final

monthly instalment, the piano was to become the absolute property of the hirer, *who had power to terminate the hiring by delivering up the instrument*; and it was held that a purchaser from the hirer before the instalments had been completed had not acquired a good title to the piano under section 9 of the Factors Act, 1889, on the ground that by the terms of the agreement the hirer had *not* "agreed to buy". On the other hand, in the latter case, where the hirer bound himself to pay £1 on the signing of the agreement and a further £96 later *and was given no option to terminate the hiring by delivering up the goods*, he was held to have entered into an agreement to buy goods within the meaning of the Factors Act.

This power of terminating the agreement is still the hall-mark of a "hire-purchase agreement", for, by section 4 (1) of the new Act, a hirer may, at any time before the final payment under a hire-purchase agreement falls due, determine the agreement by giving notice of termination in writing to any person entitled or authorised to receive the sums payable under the agreement. Any provision in a hire-purchase agreement whereby the hirer's right to determine it is excluded or restricted is declared to be void (section 5 (b)).

The application of the Act is, however, restricted to agreements under which the hire-purchase price or total purchase price (as the case may be) does not exceed—

(a) where the agreement relates to a motor-vehicle (as defined in the Road Traffic Act, 1930) or railway wagon or other railway rolling stock, the sum of £50;

(b) where the agreement relates to "live stock" (*i.e.*, horses, cattle, sheep, goats, pigs or poultry), £500; and

(c) in any other case, £100 (section 1).

By the terms "hire-purchase price" and "total purchase price" is meant the total sum payable by the hirer or buyer in order to complete the purchase of goods to which the agreement relates, *exclusive of any sum payable as a penalty or as compensation or damages for a breach of the agreement* (section 21). Special provision is made by section 19 for those cases where it is a term of a hire-purchase agreement that the owner is to carry out any installation and the note or memorandum specifies as part of the hire-purchase price the amount to be paid in respect of such installation.

The Act does not apply to any hire-purchase or credit-sale agreement made before its commencement, save in the respects, too lengthy to be discussed here, indicated in section 20. Unlike the Sale of Goods Act, 1893, it does not extend to Scotland or

Northern Ireland, and it is obvious that difficulties may arise from such a restriction in cases where a hire-purchase agreement is made in England, but the hirer later becomes resident in Scotland, or *vice versa*.

III.—Formal Requirements of Hire-Purchase and Credit-Sale Agreements.

(For a Form of Hire-Purchase Agreement under the Act, see Form 14, post, p. 500.)

Hitherto, one of the mischiefs of the hire-purchase system has been the exploitation of persons financially embarrassed by selling them articles at a price which, when all the instalments have been paid, is far in excess of their true value, and firms profiting by this system have, indeed, actively discouraged cash payments in favour of the—to them—far more profitable instalment system. A check on this evil has been imposed by sections 2 (as regards hire-purchase agreements) and 3 (as regards "any credit-sale agreement under which the total purchase price exceeds five pounds"). Before any such agreement is entered into, the owner or seller must state in writing to the prospective hirer or buyer, otherwise than in the note or memorandum itself, the price at which the goods may be purchased by him for cash. (See Form 12, *post*, p. 498.) This should secure that the prospective customer gets fair warning before any agreement is entered into of the extent to which he is to be mulcted in return for the privilege of being allowed to pay by instalments, and this may make him pause before committing himself; while, on the other hand, if the vendor, in order to prevent the discrepancy between the hire-purchase price and the cash price from being too glaring, increases the latter to any considerable extent, he will probably defeat his own ends by making it clear to the customer that, on a comparison of cash prices, he is not getting value for money.

This requirement will, however, be deemed to have been sufficiently complied with (a) if the hirer or buyer has inspected the goods or like goods and at the time of his inspection tickets or labels were attached to or displayed with the goods clearly stating the cash price, either of the goods as a whole or of all the different articles or sets comprised therein; or (b) if the hirer or buyer has selected the goods by reference to a catalogue, price-list or advertisement, which clearly stated the cash price either of the goods as a whole or of all the different articles or sets comprised therein (sections 2 (1) and 3 (1)).

Before any hire-purchase or credit-sale agreement, or any contract of guarantee relating thereto, can be enforced—

(1) the above-mentioned provisions as to indicating the cash price must have been complied with;

(2) a note or memorandum of the agreement must be made and signed *by the hirer or buyer* and by or on behalf of all other parties to the agreement. The personal signature of the hirer or buyer is apparently a *sine qua non*, a provision obviously designed to put an end to the pernicious habit of many door-to-door canvassers of signing agreements themselves and then testifying that they were authorised to do so on behalf of the harassed customer;

(3) the note or memorandum must contain:—

(i) a statement of the hire-purchase or total purchase price;

(ii) a statement of the cash price;

(iii) a statement of the amount of each of the instalments by which the hire-purchase or total purchase price is to be paid;

(iv) a statement of the date, or the mode of determining the date, upon which each instalment is payable;

(v) a list of the goods to which the agreement relates, sufficient to identify them;

(vi) (in the case of hire-purchase agreements only) a notice in the terms prescribed in the Schedule to the Act (*a*);

(4) a copy of the note or memorandum must be delivered or sent to the hirer or buyer within seven days of the making of the agreement.

The Court is empowered to excuse non-compliance with certain of these requirements if it is satisfied that the hirer or buyer has not been prejudiced thereby, but failure to execute a proper note or memorandum cannot be condoned (sections 2 (2) and 3 (2)).

Certain clauses commonly found hitherto in hire-purchase and credit-sale agreements are rendered void by section 5. Any clause authorising the owner or his agent to enter upon premises to take possession of goods let under a hire-purchase agreement or relieving them from liability for such entry is no longer valid; and those who have knowledge of the violence which has too often been part

(*a*) Such notice consists of a summary in ordinary language of the provisions of the Act regarding the hirer's right to terminate the agreement and the restrictions on the owner's right to recover goods. It must be printed or written at least as prominently as the rest of the contents of the note or memorandum (s. 3 (2) (c)).

of the procedure employed by certain firms will particularly welcome this provision. Any clause to the effect that any person acting on behalf of an owner or seller in connection with the formation or conclusion of a hire-purchase or credit-sale agreement is to be treated as the agent of the hirer or buyer is similarly rendered void, and so also is any term relieving the owner or seller " from liability for the acts or defaults of any person acting on his behalf in connection with the formation or conclusion of a hire-purchase or credit-sale agreement ". It remains to be seen how the phrases " acts or defaults " and " formation or conclusion " are judicially interpreted, but at least one may venture to prophesy that, for the future, finance companies will find it less easy than hitherto to escape liability in respect of oral warranties made to the hirer by dealers who later " place the business " in the way of the finance company.

IV.—Termination of Hire-Purchase Agreements.

Where the hirer exercises his right under section 4 (1) of terminating the agreement, he becomes liable (without prejudice to any liability which has accrued before the termination) to pay the amount, if any, by which one-half of the hire-purchase price exceeds the totals of the sums paid and the sums already due in respect of the hire-purchase price immediately before the termination, or such less amount as may be specified in the agreement (section 4). Clauses seeking to impose any additional liability on the hirer in the event of his terminating the agreement are rendered void (section 5 (b) and (c)). This provision follows closely a clause frequently found in the hire-purchase agreements entered into by many reputable firms prior to the Act, and should largely serve to eliminate the litigation which has hitherto frequently arisen as to whether what was known as the " depreciation " clause in certain hire-purchase agreements did or did not involve a penalty (see, for example, *Elsey & Co., Ltd.* v. *Hyde* and other cases cited in *Jones and Proudfoot's Notes on Hire Purchase Law* (2nd ed.), p. 16). But, for the owner's protection, it is provided that if the hirer has failed to take reasonable care of the goods hired he is liable to pay damages therefor (section 4 (2)). If the hirer determines the agreement but still wrongfully retains the goods, then, in any action brought by the owner to recover possession of the goods from the hirer, the Court must, unless satisfied that it would not be just and equitable so to do, order them to be delivered to the owner without giving the hirer an option to pay their value (section 4 (3)).

V.—Mutual Duty to Give Information.

At any time before the final payment has been made under a hire-purchase or credit-sale agreement, any person entitled to enforce the agreement must, within four days after receipt of written notice from the hirer or buyer and the tender of 1s. for expenses, supply a copy of the note or memorandum of the agreement, together with a statement signed by the owner or seller showing (i) the amount already paid, (ii) the amount due but unpaid, (iii) the date upon which each unpaid instalment became due and the amount of each such instalment, (iv) the amount which is to become payable under the agreement, and (v) the date when each future instalment is to become payable and the amount of each such instalment. Unless and until the owner or seller has furnished this information, he cannot enforce the agreement or any collateral guarantee, neither (in the case of a hire-purchase agreement) can he recover the goods from a hirer. Furthermore, failure without reasonable cause to supply such information within one month from its being requested renders the defaulter liable to a £10 fine (section 6). (See Form 15, *post*, p. 510.)

On the other hand, as hire-purchase agreements invariably provide that until the purchase has been completed the goods are to remain the property of the owner, the interests of the latter are safeguarded by the provision in section 7 that the hirer must, if requested in writing by the owner, notify the latter as to the whereabouts of the goods, and on fourteen days' default without reasonable cause the hirer is liable to a £10 fine. (See Form 16, *post*, p. 511.)

VI.—Conditions and Warranties in Hire-Purchase Agreements.

The extent to which the statutory conditions and warranties implied by the Sale of Goods Act, 1893, applied to hire-purchase agreements has hitherto been a matter of some difficulty, despite the decision of the Court of Appeal in *Felston Tile Co.* v. *Winget, Ltd.*, [1936] 3 All E. R. 473, that "a hire-purchase agreement is quite clearly *inter alia* an agreement for sale within the meaning of the Sale of Goods Act, 1893, s. 1 (1), and a conditional agreement within sub-s. (2) of that section" (*per* Scott, L.J., at p. 481). In *Karflex, Ltd.* v. *Poole*, [1933] 2 K. B. 251, to which the attention of the Court of Appeal does not appear to have been drawn in the later case, Goddard, J., said (at p. 264): ". . . it is well known, since the leading case of *Helby* v. *Matthews*, that the hire-purchase agreement, as drawn at present, is not a true contract of sale but an option of sale." Now, however, by section 8 of the

new Act the following conditions and warranties are to be implied in every hire-purchase agreement:—

(a) An implied warranty that the hirer shall have and enjoy quiet possession of the goods. This is identical with section 12 (2) of the Sale of Goods Act.

(b) An implied condition on the part of the owner that he shall have a right to sell the goods *at the time when the property is to pass.* In *Mercantile Union Guarantee Corporation, Ltd.* v. *Wheatley*, [1937] 4 All E. R. 713, distinguishing *Karflex, Ltd.* v. *Poole*, [1933] 2 K. B. 251, it was held that the implied condition as to title was sufficiently complied with if the "owners" had acquired a title by the time when the article was delivered to the hirer under the hire-purchase agreement. Now, however, it seems sufficient if the "owner" acquires his title by the time when the option to buy is exercised by the hirer, which hardly seems a satisfactory position from the point of view of the hirer who is, meanwhile, paying his instalments to a person who, from one cause to another, may never become the owner.

(c) An implied warranty that the goods shall be free from any charge or incumbrance in favour of any third party at the time when the property is to pass. This should be compared with section 12 (3) of the Sale of Goods Act.

(d) An implied condition that the goods shall be of merchantable quality, but—

(i) No such condition is to be implied where the goods are let as second-hand and the note or memorandum of the agreement contains a statement to that effect;

(ii) No such condition shall be implied as regards defects of which the owner could not reasonably have been aware at the time when the agreement was made, or, if the hirer has examined the goods or a sample, as regards defects which such examination ought to have revealed.

Compare this with section 14 (2) of the Sale of Goods Act.

(e) Where the hirer expressly or by implication makes known the particular purpose for which the goods are required, there shall be an implied condition that the goods shall be reasonably fit for such purpose. Unlike section 14 (1) of the Sale of Goods Act, articles sold under their patent or trade name are not excluded from this provision.

Terms and conditions implied by the Sale of Goods Act may, by section 55 thereof, be excluded by express agreement. But those under the 1938 Act are to be implied "notwithstanding any agreement to the contrary", save that the implied condition as to fitness for a particular purpose may be excluded or modified if

the owner proves that before the agreement was made such exclusion or modification was clearly explained to the hirer (section 8 (3)). (See Form 13, *post*, p. 499.) Nothing in section 8 is to prejudice the operation of any other enactment or rule of law whereby any condition or warranty is to be implied in any hire-purchase agreement (section 8 (4)).

VII.—Recovery of Goods Subject to Hire-Purchase Agreements.

Hitherto many firms have remorselessly snatched back their goods in the event of default on the part of the hirer, even though the delay in payment has been trifling and despite the fact that the hirer may have almost completed all his instalments. The machinery provided by sections 11—15 should serve effectively to check this practice, though they involve the placing of yet further burdens on the shoulders of the already overworked County Court Judges.

For the future, where one-third of the hire-purchase price of goods let under a hire-purchase agreement has been paid or tendered by or on behalf of the hirer or guarantor, the owner cannot enforce any right to recover possession of the goods otherwise than by action (section 11 (1)). If he recovers possession in any other way the agreement is thereupon automatically determined, the hirer is released from all liability, and both the hirer and any guarantor are entitled to recover from the owner in an action for "money had and received" any sums already paid (section 11 (2)). But these provisions do not apply to "any case in which the hirer has determined the agreement or the bailment by virtue of any right vested in him", *i.e.*, under section 4 of the Act or by the express terms of the agreement. In those cases to which section 11 applies, if the hirer refuses to give up possession of the goods to the owner he is not, by reason only of such refusal, to be liable to the owner for conversion (section 17).

Actions by owners under section 11 must be commenced in the county court (*b*) for the district in which the hirer resides or carries on business or did so at the date when the last instalment was paid; and after it has been commenced the owner must not attempt to enforce payment of any sum due under the agreement or under any collateral guarantee, except by claiming the sum in the action (section 12 (1)). All the parties to the agreement and any guarantor must be made parties (section 12 (2)). Pending the

(*b*) But it may be directed by Order in Council that the jurisdiction conferred upon County Courts by the Act may be exercised by any inferior Court specified in the Order (s. 18).

hearing of the action the Judge has power to make any order he thinks fit for the purpose of protecting the goods from damage or depreciation (section 12 (3)). At the hearing, the Judge is empowered to—

(a) order the specific delivery of all the goods to the owner without giving the hirer an option to pay their value;

(b) (provided the hirer satisfies the Court that the goods are then in his possession or control) postpone the operation of such an order on condition that the hirer or guarantor pays the unpaid balance of the hire-purchase price at such times and in such amounts and subject to the fulfilment of such other conditions as the Court thinks just;

(c) order the specific delivery of a part of the goods to the owner and transfer to the hirer the owner's title to the remainder, provided that the hirer has paid in respect of the hire-purchase price a sum which exceeds the price of such remainder by at least one-third of the unpaid balance of the hire-purchase price (section 12 (4) (6)). The method of ascertaining the "price" of such goods is provided for by section 12 (8).

If damages have been awarded against the owner in the proceedings, the Court may set off against the unpaid hire-purchase price the amount of such damages (section 12 (7)). And if the owner has recovered a part of the goods in contravention of section 11, section 12 has no application to any action he may bring to recover the remainder (section 12 (10)).

Where the Court has made an order for specific delivery but has suspended its operation, the hirer is deemed to be the bailee of the goods on the terms of the hire-purchase agreement; but no further sum will become payable on account of the unpaid balance, except in accordance with the terms of the order. On the making of such a suspended order, the Court may make such modifications of the hire-purchase agreement and any collateral guarantee as it considers necessary, having regard to the variation of the terms of payment (section 13 (1)). If during the postponement the hirer or guarantor fails to comply with any condition of the postponement or wrongfully disposes of the goods, the owner's remedy is to apply to the Court by which the order was made, unless it be a breach of any condition relating to the payment of the unpaid balance of the hire-purchase price, in which case he need not apply to the Court for leave to execute the order unless the Court has so directed (section 13 (2)). The Court may, during the postponement, vary the conditions of or revoke the postponement (section 13 (4)), but when the unpaid balance has been paid in

accordance with the terms of the order, the owner's title to the goods vests in the hirer (section 13 (3)).

If, in an action by an owner to enforce a right to recover possession of goods from the hirer, he proves that, before the action and after the right to recover possession accrued, he made a written request to the hirer to surrender the goods, the hirer's possession is to be deemed to be adverse to the owner, but this is not to affect a claim for damages for conversion (section 10). Compare this provision with the decision in *Clayton* v. *Le Roy*, [1911] 2 K. B. 1031. (See Form 18, *post*, p. 513.)

Where a hire-purchase agreement validly provides for the payment by the hirer of a stipulated sum on or after the determination of the agreement and a claim is made for the recovery of such sum in an action to which section 12 (*ante*) applies, then—

(1) if the Court orders specific delivery of part of the goods to the owner and the remainder to the hirer, such claim will be disallowed;

(2) if a postponed order is made, the Court must not entertain the claim unless and until the postponement is revoked (section 14 (1)).

Section 15 attempts to cope with the evil of the "linked-on" hire-purchase agreement by providing that, where goods have been let under an agreement and at any time after one-third of the hire-purchase price has been paid or tendered the owner makes a further hire-purchase agreement with the hirer comprising those same goods, sections 11 and 12 are to apply to such further agreement *from its commencement*, that is to say, even though one-third of the purchase price under the second agreement has not been paid.

Where a hirer is liable under two or more hire-purchase agreements made with the same owner, the hirer is entitled (notwithstanding any contrary agreement) to appropriate any sum paid by him to such agreement or in such proportions as he thinks fit; but if he makes no appropriation, the sum paid will be appropriated towards the unpaid balances in the proportions which such balances bear to one another (section 9).

VIII.—Bankruptcy of Hirer and Distress upon Hirer's Premises.

By the Law of Distress (Amendment) Act, 1908, s. 4, goods comprised in any hire-purchase agreement made by the tenant, or goods in his possession, order or disposition by the permission of the true owner under such circumstances that the tenant is the reputed owner thereof, may be distrained upon for arrears of rent, while by the Bankruptcy Act, 1914, s. 38 (c), goods "in the

possession, order or disposition of the bankrupt in his trade or business" of which he is the reputed owner are divisible among his creditors. These provisions have been the subject-matter of much litigation, particularly on the question of what are goods "comprised in a hire-purchase agreement". See, for example, *Hackney Furnishing Co.* v. *Watts*, [1912] 3 K. B. 225; *Jay's Furnishing Co.* v. *Brand*, [1915] 1 K. B. 458; and *Smart Bros.* v. *Holt*, [1929] 2 K. B. 303. In *Times Furnishing Co., Ltd.* v. *Hutchings*, [1938] 1 K. B. 775, the plaintiffs (owners) let furniture upon the usual hire-purchase agreement to the tenant, and the landlord, upon the tenant falling into arrear with his rent, distrained upon it. The plaintiffs then gave notice under the Law of Distress (Amendment) Act, 1908, stating that the furniture was their property and the distress illegal. The landlord contended that the furniture was "comprised in a hire-purchase agreement" or, alternatively, was in the "possession, order or disposition of the tenant", and that the distress was therefore legal. The hire-purchase agreement contained terms providing for its determination on notice, and also for its automatic determination if any landlord threatened or took any steps to levy a distress for rent upon the furniture. Humphreys, J., held that these two clauses were not inconsistent, and that each must be read separately and applied to the events to which it was intended to relate; that the furniture ceased to be subject to the agreement the moment the distress was levied, but that it nevertheless remained in the possession, order or disposition of the tenant, and the distress was accordingly valid.

Section 16 of the 1938 Act aims at removing the obvious difficulties that would arise in the event of a distress being levied upon the hirer or his becoming bankrupt while an action was pending by the owner or after an order for specific delivery had been made by the Court but its operation postponed. The section provides that during such postponement the goods shall not be treated as being "in the possession, order or disposition of the hirer" within the 1908 or 1914 Acts. Furthermore, after the determination of the agreement, or after the owner has commenced an action to enforce his right to recover goods let under a hire-purchase agreement, the goods are not to be treated as being "comprised in a hire-purchase agreement", notwithstanding that the Court may have postponed the operation of an order for specific delivery, though it would seem that (except where such an order has been made) the goods may still be levied upon for distress as being "in the possession, order or disposition of the hirer". (See Form 17, *post*, p. 511.)

RESTRICTIVE COVENANTS AFFECTING FREEHOLD LAND.

By C. H. S. Preston and G. H. Newsom, of Lincoln's Inn.

(*Continued from p.* 59.)

III. Burden.

1. *Introductory.*

Two main principles govern the enforcement of covenants affecting land, where there is no privity of contract or of estate.

1. At law the burden of a covenant never runs with freehold land so as to bind it in the hands of a person other than the original covenantor: *Austerberry* v. *Oldham Corporation*, 29 Ch. D. 750.

2. Restrictive covenants when once imposed as a burden upon land will be enforced in Equity against persons taking it, subject, however, to the rules discussed below: *Tulk* v. *Moxhay*, 2 Ph. 774; *Re Nisbet and Potts' Contract*, [1905] 1 Ch. 391; [1906] 1 Ch. 386.

Since almost all negative covenants come within the rule in *Tulk* v. *Moxhay* and are therefore enforceable in equity, the operation of the first principle is confined to cases of covenants clearly positive and the few instances of negative covenants to which the equitable rule does not apply.

2. *Leaseholds.*

The burden of covenants contained in leases, whether positive or negative, runs at law with the term, because there is privity of estate: *Spencer's Case*, 5 Co. Rep. 15. The rules in that case apply only where there is such privity. There is no such privity between the lessor or his assign on the one hand, and a sub-lessee or his assign on the other. Consequently between such parties the same rules are applicable as between a plaintiff and a defendant who are both freeholders. Enforcement, if any, is under the rule in *Tulk* v. *Moxhay*.

3. *Austerberry* v. *Oldham Corporation.*

1. In *Austerberry* v. *Oldham Corporation*, 29 Ch. D. 750, the defendants were a local authority in whom a strip of land forming a road was vested. The question on this part of the case was

whether they could be made liable upon a covenant to keep the road in repair entered into by trustees under whom they derived title. Since the covenant was not restrictive, the plaintiffs had to contend that the defendants were liable at law on such a covenant; it was held that they were not. Without going any further than was necessary for the decision of the case, the Court of Appeal made plain their opinion that the burden of a mere covenant (*a*) cannot be made to run with freehold land. The rule has been recently stated by Farwell, J., delivering the judgment of the Court of Appeal in *Zetland* v. *Driver* (1938), 107 L. J. Ch. 316: "No affirmative covenant requiring the expenditure of money or the doing of some act can ever be made to run with land."

Prior to the decision in *Austerberry* v. *Oldham Corporation* (1885), 29 Ch. D. 750, there were authorities which appeared to support the proposition that the burden of covenants might so run; several of such cases were explained or overruled by the Court of Appeal in that case. Of *Holmes* v. *Buckley*, 1 Eq. C. Abr. 27, where the covenant was to cleanse a watercourse, Lindley, L.J., said, at p. 572: "Having only that short note of it . . . in *Equity Cases Abridged* I fail to understand the exact grounds of that decision, specifically enforcing that covenant to cleanse. I doubt whether it was a decision to that effect." *Cooke* v. *Chilcott*, 3 Ch. D. 694, in which a covenant to erect a pump and to supply water was enforced, was declared to be wrong on this point (pp. 774, 782) (*b*). In *Morland* v. *Cook*, L. R. 6 Eq. 252, a covenant to repair a sea-wall was entered into by persons who simultaneously partitioned the adjoining lands protected thereby from the inroads of the sea. This covenant was held to be enforceable by and against the subsequent owners of the then partitioned lands. In the first place, Romilly, M.R., relied upon certain authorities for the existence of a common-law liability to repair a sea-wall, which was replaced by this covenant so long as it was observed (*c*). Secondly, he held that the case was covered by *Tulk* v. *Moxhay*: but it was a clear case of a positive covenant. Thirdly, however, and this was the point to which the Court of Appeal directed attention in their discussion of the case in *Austerberry* v. *Oldham Corporation*, the covenant could be considered as a grant by each of the partitioners of a rentcharge "of so much money as would be equivalent to his proportion of

(*a*) See also *Grant* v. *Edmonson*, [1930] 2 Ch. 24; [1931] 1 Ch. 1, where the early cases on covenants to pay rentcharges are reviewed.

(*b*) The similar covenant which was enforced in *Sharp* v. *Waterhouse*, 7 E. & B. 816, was enforced there against the original contracting parties.

(*c*) See *infra*, Excursus A on covenants to pay compensation for letting down the surface.

the total expense of repairing the sea-wall " (p. 775) ascertained by an acre-scot.

4. *Scope of the rule.*

These explanations of *Morland* v. *Cook* indicate that the scope of the decision in *Austerberry* v. *Oldham Corporation* is confined to mere covenants. Lindley, L.J., there said, at p. 781: " I am not prepared to say that any covenant which imposes a burden upon the land does run with the land, unless the covenant does upon the true construction of the deed . . . amount to either a grant of an easement or a rentcharge or some estate or interest in the land. A mere covenant to repair or to do something of that kind does not seem to me, I confess, to run with the land in such a way as to bind those who may acquire it." Many burdens upon land do bind it at law in the hands of successive holders, and an apparent covenant may upon its true construction amount to the imposition of some other burden, for example, an easement or a charge, and all takers of the land may be bound by it at law. But in the case where a covenant to pay money is construed as a rentcharge, the benefit of it cannot be made to run with other land. The necessary vesting and re-vesting in successive purchasers might take place at dates outside the period permitted by the rule against perpetuities. The benefit of a charge could, in practice, be assigned upon every transfer of certain land; but apart from this a practical difficulty must arise. If upon its true construction an apparent covenant is really a covenant, the burden cannot run at law, though the benefit even of a positive covenant may be annexed to benefited land: *The Priors' Case* apud *Spencer's Case*, 5 Co. Rep. 17; *Sharp* v. *Waterhouse*, *supra*. If it is a charge, the burdened land may be charged indefinitely, but the benefit cannot be annexed to benefited land so as to run with it. This particular difficulty does not arise if a covenant is construed as a grant of an easement. Thus, in *S. E. Ry.* v. *Associated Portland Cement Manufacturers (1900), Ltd.*, [1910] 1 Ch. 12, a railway company covenanted to permit a tunnel to be made under the railway line to join lands of the covenantee severed by the line. The devisee of the latter made a lease to the plaintiffs of the lands and of the benefit of the covenant. The Court of Appeal held that the lessee could enforce the covenant and make the tunnel. In the Court below, however, counsel for the plaintiff also argued that the covenant amounted to a reservation of an easement to the covenantee. In the absence of proper words of reservation, the easement would, of course, operate only in equity, under *Walsh* v. *Lonsdale*, 21 Ch. D. 9. But if an easement was thus reserved,

the tunnel could have been made by an assign of the covenantee's land without express assignment of the covenant, as against an assign of the covenantor, though, of course, this point was unnecessary for the decision of that case.

5. *Burden of negative covenants in equity.*

2. The principle upon which restrictive covenants are enforced in equity against persons taking the restricted land is based upon the decision of Cottenham, L.C., in *Tulk* v. *Moxhay* (1848), 2 Ph. 774; 18 L. J. Ch. 83. In that case the facts were the simplest possible. The plaintiff had sold the plot of land forming Leicester Square Garden to a predecessor in title of the defendant, taking from him a covenant to keep the piece of ground as it then was; he was held entitled to restrain the defendant from erecting buildings thereon. In so holding, Cottenham, L.C., took the step which Brougham, L.C., had refused to take in *Keppell* v. *Bailey*, 2 My. & K. 517; *viz.*, he held that a defendant who was not bound at law by the covenant would be liable in equity. In so deciding, he followed his own (*d*) earlier decision in *Mann* v. *Stephens*, 15 Sim. 377.

A restrictive covenant is an equitable burden upon land analogous to a negative easement, and the doctrine of *Tulk* v. *Moxhay* is therefore applicable under the following conditions:—

A. The covenant must be restrictive, otherwise it cannot be conceived of as a burden upon land.

B. The covenant is enforceable, where there is no privity of contract, only for the benefit and protection of land, just as an easement requires a dominant tenement.

C. The covenant cannot be enforced against purchasers for value of a legal estate in the burdened land without notice of the covenant. This follows from its purely equitable character.

6. *Negativity.*

A. The covenant must be restrictive.

Covenants may be restrictive of the user of land expressly or by implication; but a covenant simply requiring a positive act by the party bound cannot be restrictive, and will not bind the land. A mere covenant to pay or expend money is the clearest example

(*d*) It appears from both reports of *Tulk* v. *Moxhay*, though not from 15 Sim., that *Mann* v. *Stephens* came before Lord Cottenham himself (not Lord Lyndhurst who was also Lord Chancellor in 1846). For a discussion of the order therein see *Tulk* v. *Moxhay*, as reported in 18 L. J. Ch. 83.

of one which for this reason fails to bind the land (*e*): "for the land cannot spend money on improving itself": *Re Nisbet and Potts' Contract*, [1905] 1 Ch. 391, *per* Farwell, J., at p. 397. Many covenants commonly found in leases (where they are unexceptionable) are likewise incapable of binding freehold land; such are covenants to repair, to erect buildings or fences, or to maintain them when erected.

Tulk v. *Moxhay*, 2 Ph. 774, itself was a case of a covenant negative only by implication: a covenant to keep a garden as it then was implied a covenant not to build upon it. Accordingly it was not perfectly clear until *Haywood* v. *Brunswick Permanent Building Society*, 8 Q. B. D. 403, decided in 1881, that none but restrictive covenants were within the doctrine of *Tulk* v. *Moxhay*. The Court of Appeal, in *Haywood* v. *Brunswick Permanent Building Society*, decided that a covenant to repair, imposed for the better securing of a rentcharge, did not bind the land in the hands of an assignee of the covenantor. "The covenant to repair can only be enforced by making the owner put his hand into his pocket, and there is nothing to justify us in going to that length": *per* Cotton, L.J., at p. 409. It was, however, suggested by Fry, J., in *Andrew* v. *Aitken*, 22 Ch. D. 218, at p. 220, that such a covenant might compel the owner to permit repairs to be done upon the land by the covenantee. But even if this were so, it would in no way affect the principle; for such an obligation to permit, or not to oppose, is the negative implied in a particular case as a matter of construction as explained below: cf. the covenant in *S. E. Ry.* v. *Associated Portland Cement Manufacturers (1900), Ltd.*, [1910] 1 Ch. 12.

The decision in *Haywood* v. *Brunswick Permanent Building Society* was approved in the following year in *L. & S. W. Ry.* v. *Gomm*, 20 Ch. D. 562. The latter case, though well known for the remarks of Jessel, M.R., upon restrictive covenants generally, was actually one of a covenant to reconvey land upon six months' notice at any time. This was a covenant of an entirely different kind, and was attacked on the ground that it involved, or might involve, revesting at a date too remote, and must fail as infringing the rule against perpetuities. That rule can, however, have no application whatever to restrictive covenants, though efforts have been made from time to time to apply it. As there is no question of any vesting, such efforts have invariably failed (*f*). *L. & S. W.*

(*e*) See, for example, *Greenhalgh* v. *Brindley*, [1901] 2 Ch. 344. This principle is applied even to the expense of successful litigation: see *Hall* v. *Ewin*, 37 Ch. D. 74, per Cotton, L.J., at pp. 79—80, discussed V, § 41.

(*f*) An unsuccessful attempt was made in *Zetland* v. *Driver*, [1937] Ch. 651; (1938), 107 L. J. Ch. 316, to apply the perpetuity rule to a power given to the

Ry. v. *Gomm*, however, is here material not for disposing of the perpetuity argument, but for its approval of the "wholesome restriction upon the principle" of *Tulk* v. *Moxhay* laid down in *Haywood* v. *Brunswick Permanent Building Society*.

The basis of the doctrine of *Tulk* v. *Moxhay* was thus described by Farwell, J., in *Re Nisbet and Potts' Contract*, [1905] 1 Ch. 391, at p. 397: "Effect is to be given to the negative covenant by means of the land itself. But the land cannot spend money on improving itself and there is no personal liability on the owner . . . because there is no contract on which he can be sued." To qualify as a restrictive covenant, therefore, the covenant must be one which can upon its true construction be conceived as a burden upon the land, affecting it in the hands of successive owners like the "negative easement" referred to by Jessel, M.R., in *L. & S. W. Ry.* v. *Gomm*, 20 Ch. D. 562, at p. 583, but operating in equity only.

7. *Implied negatives.*

Many covenants are of course negative in form and in substance. But Equity does not look to the form. It is therefore immaterial whether a covenant is framed as one "not to erect any other buildings than one private dwelling-house on each plot", or "to erect one private dwelling-house only on each plot". It is enough if it is in substance negative, and can be made so in form by mere translation. Conversely, a covenant substantially positive will not be saved by its negative form; for example, a covenant "not to let a building fall into disrepair".

There is, however, a further group of negative covenants, derived not from this mere verbal manipulation, but implied as corollaries to an expressed positive covenant. Thus covenants to erect a building of a particular kind have in some cases been held to imply a covenant to keep the building so erected as a building of that particular kind: see the cases referred to in V, § 36. Cf. the observations of Fry, J., in *Andrew* v. *Aitken* referred to *supra*, § 6. Covenants to produce title deeds may be of this kind. The learned author of *Williams on Vendor and Purchaser* says: "It is now considered that the burden thereof does not run at law with the lands retained by the covenantor. It is thought, however, that in equity the covenantor's successor in title to the deeds (other than purchasers for value without notice of the covenant) would be affected by the duty of production; for this

covenantee and his assigns to form opinions as to what constituted an annoyance at future dates.

seems to resemble a restriction upon the free use of the deeds rather than an obligation positively affirmative, such as a liability to lay out money" : 4th ed., p. 700. In practice such covenants have been replaced by statutory acknowledgments : Law of Property Act, 1925, s. 64.

8. *Conditional restrictions.*

Restrictive covenants may also be divided into the simple class which impose an absolute prohibition on some particular user of the land, and the more complex class which permit a particular user only on terms. The simple class is exemplified by : "not to sell intoxicating liquors," "not to carry on a noisome trade or business," or "to use as a private dwelling-house only". More complex are : "not to carry on any trade without the previous consent in writing of the vendor," "before building to submit plans to the vendor's surveyor." The latter class, whatever their form, substantially prohibit a particular user of the land except upon a condition, which is introduced by words such as "before" or "without" or "except on terms of", or which can be so expressed. It is no part of the doctrine that the act introduced by these words, *i.e.*, the condition itself, should be negative. Thus a positive act may sometimes be required by the machinery of a restrictive covenant. It is not required *simpliciter* but only as a condition, whether precedent or continuing, of a particular user, which the owner is under no obligation to have. Thus, though the payment of money is a typical example of a positive act, payments by owners can be secured in this way where they constitute the terms on which another act can be done. A common stipulation, and one undoubtedly restrictive, is that requiring the purchaser of one lot on a building estate "to erect one dwelling-house only, and before such erection to submit plans to the vendor's surveyor for his approval": *Powell* v. *Hemsley*, [1909] 1 Ch. 680; 2 Ch. 252. This is a covenant not to build except on terms of submitting plans for approval, and it is no less restrictive because instead of imposing an absolute veto upon all building, it forbids it only if certain terms are not complied with. Such a covenant may well include also a condition that the surveyor's fee shall be paid : the covenant will be none the less restrictive : see *Reading Industrial Co-operative Society, Ltd.* v. *Palmer*, [1912] 2 Ch. 42. Further examples of the same kind are to be found in the series of cases dealing with covenants for the payment of compensation for injury to the surface of land by mining operations beneath it : see *infra*, Excursus A.

9. *L. C. C.* v. *Allen.*

B. Restrictive covenants will never be enforced against persons other than the original contracting party, except for the benefit and protection of land.

This rule was definitively laid down in *L. C. C.* v. *Allen*, [1914] 3 K. B. 642. In that case M. J. Allen had entered into restrictive covenants with the L. C. C. Breaches of the covenants were committed upon the land, part of which remained vested in M. J. Allen, but part of which had been sold by him. The L. C. C. succeeded in contract against M. J. Allen himself, but were unable to do so against purchasers from him, because the L. C. C. had no land to be protected (*g*). Buckley, L.J., thus stated the law at p. 660. " Upon the authorities as a whole, I am of opinion that the doctrine in *Tulk* v. *Moxhay* does not extend to the case where the covenantee has no land capable of enjoying, as against the land of the covenantor, the benefit of the restrictive covenant. . . . When the covenantee has no land, the derivative owner claiming under the covenantor is bound neither in contract nor by the equitable doctrine which attaches in the cases where there is land capable of enjoying the restrictive covenant."

In cases where both the benefit and the burden are required to devolve, the present rule adds little to the conditions which must be fulfilled for the devolution of the benefit. If the plaintiff has succeeded in showing that he has land " touched and concerned ", or " capable of being benefited " (see II, §§ 6, 15), he will have discharged also the onus laid on him by the rule in *L. C. C.* v. *Allen*. But the rule is not limited to cases in which the benefit must also devolve; and the apparent novelty of the rule derives from the fact that in that case the plaintiffs were entitled to sue as original contracting parties.

The decision was in accordance with the better line of authorities including *L. & S. W. R.* v. *Gomm*, 20 Ch. D. 562; *Re Nisbet and Potts' Contract*, [1905] 1 Ch. 391; [1906] 1 Ch. 386; and *Millbourn* v. *Lyons*, [1914] 1 Ch. 34; 2 Ch. 231. It finally departed, however, from the principle followed in a line of earlier cases. Those cases made notice to the defendant the gist of the action, and were based upon it to the exclusion of the overriding consideration that restrictive covenants are only enforceable against others than the original covenantor by virtue of the possession of land. The question of notice or no notice may be material as part of a defence (see *infra*, § 10), but it does not

(*g*) The case would now be decided differently; local authorities do not now need protected land: see II, § 27.

create the cause of action. In *Catt* v. *Tourle*, L. R. 4 Ch. 654, and *Luker* v. *Dennis*, 7 Ch. D. 227, for example, it is true that covenants were enforced without reference to any protected land; but these cases were disapproved in *L. C. C.* v. *Allen*. Again in *Keates* v. *Lyon*, L. R. 4 Ch. 218, the overriding principle was not entirely disregarded, but the requirement of protected land was held to be fulfilled by the expectation of the covenantee that he would obtain land capable of enjoying the covenant (*h*).

There must be protected land at all material times. If the covenantee has none at the date of the covenant, there will never be any further liability than a contractual one. Similarly, if the protected land is leasehold, the covenant will not be enforced vicariously after the expiration of the term in the protected land. In the cases of which *Ricketts* v. *Empire Churchwardens*, [1909] 2 Ch. 544, is the typical example, the lessor restricts the user of his adjoining freehold. The lessee and his assigns can rely on the leasehold interest to enforce such a covenant under *Tulk* v. *Moxhay*, but only so long as the term continues.

Similarly, it is submitted that restrictive covenants are destroyed where the fee simple in the benefited and in the burdened land become vested in the same person. Then there ceases to be land to be protected; and as in the case of an easement, the fact that the owner exercises certain forbearances on part of his land is merely the particular user which as owner he chooses to have. Upon the subsequent partition of the land, however, the covenant can scarcely be said to revive: it cannot be "of necessity" like a way, nor "continuous and apparent". It is accordingly submitted, though there is no authority on the point, that such unity of seisin destroys the covenant, and does not merely suspend it. It may well be a practical question, since it is not uncommon for the abstract of title to a plot on a building estate to take the following form:

1928. Conveyance by builder to owner-occupier, subject to covenants for the protection of the unsold part of the builder's estate.
1928. Legal charge by owner-occupier to building society.
1930. Conveyance by building society as mortgagee under its power of sale (reciting default of owner-occupier) to the same builder.
1931. Conveyance by builder to a new owner-occupier.

(*h*) The historical aspect is fully treated in Mr. Behan's "Covenants affecting land". For the position of covenants primarily protecting trade interests, see *infra*, Excursus B; and for covenants restricting the user of chattels, see *infra*, Excursus C.

If the covenants are not taken afresh in the conveyance of 1931 it is submitted that they cannot be enforced by the builder and his subsequent assigns, in the absence at any rate of a scheme of development.

10. *The purchaser for value of a legal estate without notice.*

C. A restrictive covenant can be enforced against any person taking the burdened land, or any derivative interest therein (see *infra*, § 17), unless he is a purchaser for value of a legal estate without notice of the covenant.

This defence exemplifies the familiar principle that an equitable right cannot prevail against a legal one, unless the effect of the legal right can be avoided by fixing its possessor with an inferior position in equity, *i.e.*, with notice: *Pilcher* v. *Rawlins*, L. R. 7 Ch. 259.

Accordingly it is always a good defence to an action for breach of a restrictive covenant that the defendant was a purchaser for value of a legal estate in the burdened land without notice of the covenant, or that he claims under such a purchaser.

The latter branch of the rule is exemplified by *Re Nisbet and Potts' Contract*, [1905] 1 Ch. 391; [1906] 1 Ch. 386; it was common ground that Potts had actual notice, and the question was whether former owners lacked constructive notice so as to protect him. See also *Wilkes* v. *Spooner*, [1911] 2 K. B. 480; *Barrow's Case*, 14 Ch. D. 432.

The plea of purchaser for value of a legal estate without notice is a single plea, to be made by the defendant. "It is not to be regarded as a plea of 'purchase for value' to be met by a reply of 'notice'": *per* Farwell, J., in *Re Nisbet and Potts' Contract*, [1905] 1 Ch., at p. 402. This observation indicates in the first place where the onus of proving no notice lies; see also *Att.-Gen.* v. *Biphosphated Guano Co.*, 11 Ch. D. 327; *Wilkes* v. *Spooner*, [1911] 2 K. B. 480. In the second it corrects the impression created by those earlier cases which purported to follow *Tulk* v. *Moxhay*, and in so doing based the doctrine of restrictive covenants upon notice, which they made the gist of the action. (See *supra*, § 9.) The true view is that the burden of a restrictive covenant is an equitable burden which binds the land, into whosesoever hands the same may come, subject only to the qualification now being discussed. "That qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate and did not create the right, and if the purchaser took only an equitable estate he took subject to the burden whether

he had notice or not": *per* Jessel, M.R., in *L. & S. W. Ry.* v. *Gomm*, 20 Ch. D. 569, at p. 583.

11. *Notice.*

The notice which must be disproved to make good this defence is actual or constructive notice. Subject to the statutory provisions mentioned below, a purchaser is affected by notice of matters of which he has actual knowledge, or of matters of which his solicitor or agent has knowledge, or of which knowledge would have been obtained on a proper investigation of title. Attention is drawn here only to the provisions of the 1925 legislation particularly affecting restrictive covenants.

12. *Registration as land charge.*

(i) Registered land charges.

"A covenant or agreement (not being a covenant or agreement made between a lessor and lessee) restrictive of the user of land entered into after the commencement of this Act (in this Act referred to as 'a restrictive covenant')" is registrable as a Class D (ii) land charge: Land Charges Act, 1925, s. 10 (1).

If, however, it is acquired by a local authority it is registrable as a "local land charge": *ibid.*, s. 15; see II, § 27.

The effect of such registration is to give "actual notice of" the document registered "and of the fact of such registration, to all persons and for all purposes connected with the land affected, as from the date of registration or other prescribed date and so long as the registration continues in force": Law of Property Act, 1925, s. 198 (1). This section includes deeds registered in the Yorkshire Deeds Registry: Law of Property Act, 1925, s. 205 (1) (iii), and Land Charges Act, 1925, s. 10 (6).

A registrable restrictive covenant is made void against "a purchaser of a legal estate for money or money's worth" unless registered before the completion of the purchase: Land Charges Act, s. 13 (2). It is further provided that a purchaser (which means one for value) (*i*) is not prejudicially affected by notice of a land charge capable of being but not registered: Law of Property Act, 1925, s. 199 (1); or by notice of a land charge registered within two days after the delivery of an official certificate of search: Law of Property (Amendment) Act, 1926, s. 4 (2). Even the memorandum of a vendor's covenant affecting his retained land endorsed upon a document retained by him under Law of

(*i*) See Wolstenholme & Cherry, *Conveyancing Statutes* (12th ed.), Vol. I, p. 573.

Property Act, 1925, s. 200 (1), does not dispense with the necessity for registration : *ibid.*, sub-section 4 (a).

Subject to the point mentioned in the next paragraph, the result is : that, as to covenants entered into after 1925, registration and registration only is notice to a purchaser; as to covenants entered into before 1926, the old rules as to actual and constructive notice apply with the statutory modifications noted below.

One point in the definition of a registrable land charge requires comment. It excludes covenants made between lessor and lessee. Covenants contained in leases, to which, however, the words of exclusion are not limited, normally deal with acts to be done or forborne on the demised land. But there is the exceptional case where a covenant requires the act or forbearance of the lessor elsewhere. Such a covenant on the part of the lessor, whether contained in the lease or, presumably, in a supplemental document, is not registrable, and the purchaser of the burdened land from the lessor is as to notice of such a covenant in the position of a purchaser before 1926. The disadvantage in such a case is the lessee's, for the covenant being contained in a separate document is not one with constructive notice of which the purchaser of the burdened land can be fixed : *Carter* v. *Williams*, L. R. 9 Eq. 678; *Wilkes* v. *Spooner*, [1911] 2 K. B. 480. It is suggested that a lessee can and should protect himself in such a case by stipulating in the contract for his lease that a memorandum of any such covenant should be endorsed on at least one of the title deeds of the burdened land.

13. *Registered land.*

Land registration was not initiated by the 1925 legislation, but the code governing it is now contained in the Land Registration Act, 1925. By section 110 (7) of that Act, entry upon the register is the only form of notice of covenants affecting registered land.

Local land charges are, however, overriding interests: *ibid.*, s. 70 (1) (i); and the rules affecting unregistered land therefore apply to them.

Registration confers no rights otherwise non-existent: *Willé* v. *St. John*, [1910] 1 Ch. 84, 325; see, however, *White* v. *Bijou Mansions, Ltd.*, [1937] Ch. 610; [1938] Ch. 351; *infra*, § 14.

14. *Patman* v. *Harland.*

(ii) The abrogation of the rule in Patman *v.* Harland, 17 Ch. D. 353.

The defence of purchaser for value without notice is available

to a lessee who takes a legal estate, no less than to a purchaser of the freehold. But under the rule laid down in the case cited a lessee was fixed with constructive notice of everything that would have been disclosed on a full investigation of his lessor's title, notwithstanding that he had no right to call for it. Thus an underlessee had constructive notice of covenants contained in the head-lease, or in an assignment thereof: *Clements* v. *Welles*, L. R. 1 Eq. 200; *aliter*, however, if they were contained in a document not forming part of the underlessor's title: *Carter* v. *Williams*, L. R. 9 Eq. 678. This rule is reversed by Law of Property Act, 1925, s. 44 (5), which provides: "Where by reason of any of the three last preceding subsections, an intending lessee or assign is not entitled to call for the title to the freehold or to a leasehold reversion, as the case may be, he shall not, where the contract is made after the commencement of this Act, be deemed to be affected with notice of any matter or thing of which, if he had contracted that such title should be furnished, he might have had notice." This provision does not protect a lessee who had actual notice, nor does it protect him from the statutory actual notice given by registration under Land Charges Act, 1925. Nor does it protect a lessee of registered land subject to a covenant appearing on the register of the freehold title, although he has no right to see the register of that title: *White* v. *Bijou Mansions, Ltd.*, [1937] Ch. 610; [1938] Ch. 351; to this extent the rule in *Patman* v. *Harland* still survives.

It remains to consider (1) the persons who can bind the land in the hands of subsequent owners or occupiers, and (2) the classes of derivative owners who are bound while they hold the land.

15. *Persons who can bind land.*

Upon general principles, a covenant binds the land only for the interest of the covenantor. Thus, if the original covenantor is entitled in fee simple, all persons are bound. On the other hand, no person taking the land under a title paramount to that of the covenantor could be affected by the covenant, even if the covenantor purported to have, and bind, the fee: cf. *Johns Bros.* v. *Holmes*, [1900] 1 Ch. 188. Similarly, persons having only limited interests can bind those interests, though they cannot bind the fee. In *Wilkes* v. *Spooner*, [1911] 2 K. B. 480, a lessee restricted by covenant the user of his leasehold premises for the residue of the term. The Court of Appeal held that the covenant was effective for that purpose, even against the landlord to whom the term was surrendered, although upon the facts the Court held

that the landlord had no actual or constructive notice of the covenant.

Similar considerations apply in circumstances where a burden is imposed on land by a mortgagor. It is well settled, for example, that a brewer's tie can only be imposed upon a public-house, by a mortgage to a brewer, so long as the mortgage remains on foot: *Noakes & Co., Ltd.* v. *Rice*, [1902] A. C. 24. And in *Johns Bros.* v. *Holmes*, [1900] 1 Ch. 188, where such a tie was contained in a mortgage by sub-demise of a leasehold public-house, the draftsman did not attempt to make the tie survive the repayment of the mortgage money. In these circumstances a person claiming under the mortgagor would be bound during that period, but no longer (*k*).

A public authority, buying land for purposes for which it is authorised by statute to acquire it, may bind the land by restrictive covenants, provided that the restrictions do not impair the purpose of its acquisition; covenants conflicting with user for the statutory purpose would be *ultra vires* and void: *Stourcliffe Estates Co., Ltd.* v. *Bournemouth Corporation*, [1910] 2 Ch. 12. Normally land acquired under statutory powers can be sold subject to covenants by the purchaser, when it is no longer required for the statutory purpose. But in *Davis* v. *Leicester Corporation*, [1894] 2 Ch. 208, the corporation laid out land in plots for development; an auction sale was abortive, but two of the plots were sold shortly afterwards to the plaintiff subject to the conditions of the auction sale. The land was conveyed to the plaintiff with the necessary consent of the Treasury and subject to restrictive covenants, but the conveyance did not refer to the scheme of development or the abortive sale. The plaintiff could not afterwards rely on the existence of a building scheme binding the unsold land because the Treasury's consent did not extend to its creation.

16. *Absence of the legal estate.*

The absence of the legal estate is not in itself sufficient to prevent a restrictive covenant being imposed on the fee simple. In *L. C. C.* v. *Allen*, [1914] 3 K. B. 642, for example, the covenantor had, at the date of the covenant, a mere option to purchase the fee which he subsequently exercised. Similarly, in *Abbey* v. *Gutteres*, 55 S. J. 364, a builder entered upon land under an agreement whereby he would be entitled to call for a ninety-nine year lease, when he had built a block of flats. Before the flats were built he covenanted with an adjoining

(*k*) A tenant for life can bind the settled land remaining undisposed-of on a disposition of part: Settled Land Act, 1925, s. 49 (1) (b).

owner to glaze the lower windows with opaque glass (a covenant held impliedly negative). He duly built, and obtained his lease. The plaintiff had purchased the protected land from the covenantee. The defendant had a twenty-one-year lease of a flat from an assign of the covenanting builder, and had constructive notice, with the consequence that the action succeeded.

Upon the sale of land the contract for sale confers an equitable fee upon the purchaser. But this equitable estate does not enable him to bind the land by any restrictive stipulation there may be in the contract for sale. In *Millbourn* v. *Lyons*, [1914] 1 Ch. 35; 2 Ch. 231, a contract for sale of freehold provided for certain restrictive covenants to be entered into by the purchaser. The sale was duly completed, and the covenants entered into. But they were unenforceable, except between the original parties (on the principle afterwards laid down in *L. C. C.* v. *Allen*, [1914] 3 K. B. 642), because at the date of completion the vendor retained no land to be protected. This objection did not apply to the provisions in the contract, at the date of which the vendor still had such land to be protected, and the purchaser of course had an equitable fee under his contract. Nevertheless those provisions were held not to bind the burdened land. Neville, J., and the Court of Appeal put their decision upon the ground that provisions in a contract are completely superseded by the conveyance; indeed, it would cause a revolution in conveyancing practice if that were not so, because otherwise all contracts, as well as all conveyances, would come on the title. But it was admitted that an owner can bind his land notwithstanding that the legal estate is outstanding, just as a mortgagor, not by demise, could before 1926 annex the benefit of covenants to the protected land. *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, is an authority for the latter proposition only, not the former, for which it was cited in *Millbourn* v. *Lyons*. In *L. C. C.* v. *Allen* and *Abbey* v. *Gutteres* there was no land to be conveyed by the covenantee to the covenantor, and so no question of any superseding document.

17. *Persons who may be sued.*

It is immaterial whether the defendant in an action for breach of restrictive covenants is an assign of the covenantor in the strict, or indeed in any, sense. If the defendant takes the interest of the covenantor, or any interest derived out of it, he is liable on the covenants. Such has always been the equitable rule : by Law of Property Act, 1925, s. 79 (1), it is now statutory. Persons entitled to the benefit of covenants affecting the freehold of the burdened land have been held entitled to enforce restrictive

covenants against lessees (*Wilson* v. *Hart*, L. R. 1 Ch. 463; *Jones* v. *Bone*, L. R. 9 Eq. 673; *Nicoll* v. *Fenning*, 19 Ch. D. 258); mere occupiers at will (*Kelsey* v. *Dodd*, 52 L. J. Ch. 34); and squatters (*Re Nisbet and Potts' Contract*, [1905] 1 Ch. 391; [1906] 1 Ch. 386). Persons taking land by devolution are expressly bound: Law of Property Act, 1925, s. 80 (2). In cases between head-lessors and persons with whom they have no privity of contract or estate exactly similar considerations apply: *Doe* d. *Palk* v. *Marchetti*, 1 B. & Ad. 715; *Evans* v. *Davies*, 10 Ch. D. 747; *Hall* v. *Ewin*, 37 Ch. D. 74; *Mander* v. *Falcke*, [1891] 2 Ch. 554; *Barton* v. *Reed*, [1932] 1 Ch. 362. Moreover, non-execution of the deed containing the covenant will not put the covenantee and persons claiming under him beyond the reach of equity, if they hold under that deed: *Formby* v. *Barker*, [1903] 2 Ch. 539, at p. 547. Nor is the absence of express words of covenant material, if the intention to bind the land is plain: *Hodson* v. *Coppard*, 29 Beav. 4; *Williamson* v. *Sunderland Corporation*, 9 T. L. R. 143. In *Re Rutherford's Conveyance*, [1938] Ch. 396, however, land was conveyed to a sub-purchaser by the original vendor and the intermediate purchaser, by a deed which contained a schedule of stipulations, subject to which the land was expressed to be conveyed, but contained no words of covenant. Simonds, J., said at p. 407: "The conveyance . . . did not impose any contractual obligation on the [sub-purchaser], and further, if it did, it did not impose on him a contractual obligation to the [intermediate purchaser] the benefit of which the latter could assign."

18. *Land taken under statutory powers.*

Where land is taken by a person or body under statutory powers, the transfer of it "by the 81st section of the Lands Clauses Consolidation Act, 1845 . . . destroys all rights and interest in the land which shall have been purchased or compensated for by the consideration therein mentioned": *Ellis* v. *Rogers*, 29 Ch. D. 661, *per* Kay, J., at p. 665. It is immaterial whether the compulsory powers are actually utilised or are anticipated by agreement: *Kirby* v. *Harrogate School Board*, [1896] 1 Ch. 437. Cf. *Bailey* v. *Crespigny*, L. R. 4 Q. B. 180; V, § 40. Compensation can, however, be obtained under section 68 of the same Act: *Kirby* v. *Harrogate School Board*; *Long Eaton Recreation Co.* v. *Midland Ry.*, [1902] 2 K. B. 574; *Re Simeon*, [1937] Ch. 525. If compensation is not paid, the covenants, although suspended as against the public body, are enforceable against a subsequent private purchaser: *Ellis* v. *Rogers*, 29 Ch. D. 661.

Excursus A.

Covenants to Pay Compensation for Injury to Surface Lands by Mining Operations.

1. *Introductory.*

Provisions that the mine-owner shall pay for injury to the surface occasioned by the working of mines are very commonly inserted in mining leases and in grants of mines. They have been enforced without privity of contract in a long series of cases, but they can be and have been explained on at least two different principles.

2. *Restrictive covenants.*

A provision of this kind can be considered "as a restrictive covenant restraining the getting of coal except upon the terms of making satisfaction": *per* Swinfen Eady, M.R., in *West Houghton U. D. C.* v. *Wigan Coal and Iron Co.*, [1919] 1 Ch. 159. If such be the true view, this series of cases provides further examples of the securing of money payments by restrictive covenants enforceable under *Tulk* v. *Moxhay*. The words are forced into the form "not to do certain acts without", etc., and the typically positive act of paying money is required as a condition of breaking a restrictive stipulation. A selection from the series of cases can be made to illustrate this view.

Thus it was early decided that such a covenant was not purely collateral and could be enforced against the covenantor and his assigns, who had the mines for a limited interest (*Norval* v. *Pascoe*, 34 L. J. Ch. 82), by the covenantee and his assigns, who had the freehold of the mines and of the surface (*Martyn* v. *Williams*, 26 L. J. Ex. 117). These were perfectly straightforward cases, where the plaintiff owned the freehold of the surface and the mines, subject only to the interests of the defendants in the mines; they were, however, of the exceptional class of lessor-lessee case where performance touches and concerns the thing demised but actually takes place elsewhere: see II, § 7. A more complex situation arose in *Forster* v. *Elvet Colliery Co.*, [1908] 1 K. B. 629; affd. *sub nom. Dyson* v. *Forster*, [1909] A. C. 98. There the surface and the reversion in the mines were at all material times in different hands. The mining lessee covenanted with (*inter alios*) "the owners for the time being" of the surface to pay compensation for injury thereto. Four actions were brought, one by the trustees of Forster who had been owner of part of the surface at the date of the lease, and three by three purchasers from other such surface owners; in each action the defendants were the executors of the

original lessee and the company to which his executors had assigned the lease. It was held that the covenants were enforceable by the surface-owners as successors of persons entitled to enforce the covenant under Real Property Act, 1845, s. 5 (now Law of Property Act, 1925, s. 56). That section would not, however, have enabled the plaintiffs to sue had the covenant not been one running with land; nor could they have succeeded against the company, unless the company as assign of the original covenantor had been bound. Although the covenant was contained in a lease, it was not in any sense a lessor-lessee case; for the covenant sued on was not one with the lessor, but one made under the statute by the lessee with persons who were not parties, but who had vertically adjoining land. The pure freehold case arose in *Snowdon* v. *Ecclesiastical Commissioners*, [1935] Ch. 181. A conveyance of land contained a reservation to the vendor of the mines and minerals subject to a proviso as to payment of compensation for damage to the surface. The plaintiff derived title under the purchaser of the surface, and had the benefit of the proviso by express words: the defendants derived title under the vendor, and caused a subsidence. The plaintiff succeeded in his action, though not as to damage accrued before he took a conveyance. It was here taken for granted that the defendant was subject to the burden: "There is no doubt but that that proviso constitutes a covenant . . . which runs with the land"; *per* Luxmoore, J., at p. 185. The case in fact was exactly covered by *Forster* v. *Elvet Colliery Co.* on this point, but, since no leasehold interests existed, it illustrates plainly that such a covenant affects the freehold.

3. *Liability at law for causing subsidence.*

But there is a common law liability for causing subsidence, and, as Cotton, L.J., said in *Austerberry* v. *Oldham Corporation*, 29 Ch. D. 750, at p. 779, such cases "would be very different from the case of creating a new liability". An alternative explanation is therefore that put by Bramwell, B., in *Aspden* v. *Seddon*, 1 Ex. D. 496, at p. 504: "There is a remedy at common law for the compensation stipulated to be paid when the licence (to permit subsidence on terms) is exercised." It is not a case of a different view being taken by the Courts of law and of equity. The case of *Aspden* v. *Seddon* was first brought (before the Judicature Act) in equity; and the plaintiff's bill was dismissed without prejudice to his rights at law (L. R. 10 Ch. 394). Recourse was had to the Courts of law, and Bramwell, B., summed up the position as follows: "It seems to me, therefore, speaking with the reservation with which I always speak of equitable rights, that

there would have been a remedy in the Court of Equity if there had not been one at law; and I collect that that was the opinion of the Master of the Rolls and the Lords Justices; but they were of opinion that there was a right at law, and so am I" (1 Ex. D., at p. 502). But Bramwell, B., was not prepared to found the plaintiff's claim in tort, by putting his decision on the ground that the licence was effective only so long as due compensation was paid. He said on a point of pleading taken by the defendant "whether the correct form of action would be assumpsit or an action on the case, I think it unnecessary to consider. For aught I know the remedy is in tort, *though I think not*, on the ground that the defendant by not paying the compensation, as it were, defeated his licence. . . It is enough for us to say that there is a remedy at common law for the compensation stipulated to be paid when the licence is exercised" (1 Ex. D., at p. 504). In *Morland* v. *Cook*, L. R. 6 Eq. 252, a similar argument was applied by Romilly, M.R., to a covenant to pay for repairing a sea-wall: cf. also sale of goods under a licence from the patentee: see Excursus C, *infra*.

Quite apart from the subsidence cases where no express provision had ever been made for the payment of compensation, the suggestion of Bramwell, B., that an alternative ground for ordering compensation to be paid might be found in the law of tort has been carried into effect in a later case where the circumstances prevented the plaintiff succeeding in covenant. In *West Houghton U. D. C.* v. *Wigan Coal and Iron Co.*, [1919] 1 Ch. 159, it was held that the benefit of the covenant was not annexed to the plaintiff's land, and that the plaintiff (a lessee) had not obtained the benefit of the covenant by express assignment. Being thus disqualified from suing in covenant, he nevertheless succeeded in tort; and the defendants were not permitted to say that their licence to let down the land by mining operations had taken away the natural right of the surface owners to support, unless they complied with the terms imposed by the licence and paid the compensation. As a matter of construction, it was only to this extent that the surface owners had been deprived of their natural right.

4. *Summary.*

The cases cited do not permit a confident choice between the conflicting principles. The possible views are that the payments by way of compensation can be obtained from the person having the mines (a) under *Tulk* v. *Moxhay*, 2 Ph. 774, as arising from covenants impliedly restrictive; (b) at law, as an exception to the rule laid

down in *Austerberry* v. *Oldham Corporation*, 29 Ch. D. 750, that the burden of covenants never runs at law; (c) in tort, on the ground that the surface-owner's right of support and remedy for disturbance of it are only taken away so long as the mine-owner carries out the terms of his licence to cause subsidence by paying the compensation provided for. The last alternative was certainly not the ground upon which most of the cases were put. Bramwell, B., did not favour it, and its acceptance would involve that almost all the reasoning devoted to this subject in the reports is misconceived. In the exceptional case, however, a plaintiff may succeed in tort where he is disentitled from suing on the express covenant (as in *West Houghton U. D. C.* v. *Wigan Coal and Iron Co.*, [1919] 1 Ch. 159). As between alternatives (a) and (b), however, the question is more difficult. It would be in accordance with principle to consider the cases as applications of *Tulk* v. *Moxhay*; and this is on the whole the better view. But *Aspden* v. *Seddon* is a clear authority for the contrary: both in the Chancery Courts (L. R. 10 Ch. 394) and the Exchequer Division (1 Ex. D. 496) the remedy was held to be at law. Further, the *dictum* of Luxmoore, J., cited above, is, if strictly interpreted, an authority for this view, since "running" is a word properly applicable only to the *legal* transmission of benefit and burden. It is, however, possible that Luxmoore, J., was at that point considering the benefit, which undoubtedly did run at law, rather than the burden. But prior to *Austerberry* v. *Oldham Corporation*, 29 Ch. D. 750, there were several cases outstanding which appeared to permit the running of the burden of covenants at law; and before that case the question whether they did so run was still an open one. It is therefore not unreasonable to attribute the views taken in *Aspden* v. *Seddon* to an incomplete grasp of the rule definitively laid down ten years later in *Austerberry* v. *Oldham Corporation*, and to suggest that if it had arisen after *Austerberry* v. *Oldham Corporation* the result would have been the same but would have been based on somewhat different grounds.

The question might arise as a practical one in a case where (i) the defendant established that he was a purchaser for value of a legal estate in the mines without notice of the provisions, and (ii) the plaintiff was unable to sue in tort, and was therefore bound to rely on the covenant. Point (ii) might arise from the words of a particular deed, which took away the natural right of support in unconditional terms (as in *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*, [1909] 1 Ch. 37; [1910] A. C. 381), and separately provided for compensation for subsidence: cf. *Jones* v. *Consol. Anthracite Collieries, Ltd. and Dynevor*, [1916] 1 K. B. 123.

Or a particular plaintiff might be unable to sustain an action in tort for subsidence and so be compelled to rely on the covenant. Again, it might well be a practical question whether such a provision amounted to a restrictive covenant and was capable of registration under Land Charges Act, 1925, if made after 1925; but even here a plaintiff might succeed in tort where no such registration had been effected upon the principle laid down above.

Excursus B.

Covenants restricting the User of Land for Trades and Businesses.

1. *Introductory.*

Covenants restricting the user of land for trades and businesses may be capable of running with it. An owner of land may properly seek to protect it against those trades and businesses, and those modes of conducting them, which, if permitted on neighbouring land, will detract from the value or amenity of his land. Similarly, a reversioner upon a lease has an interest, as such, in the non-user of the land during the term in a way which will injure the character of the property. But some covenants restricting the user of land for trades and businesses are different, and ought to be considered as collateral: internal or external evidence shows them to have been imposed for the purpose of preventing competition in trade or to protect the covenantee in some other capacity than that of land-owner. As a matter of principle, it is submitted that the latter class ought not to be held to bind persons claiming under the covenantor, because in regard to them the plaintiff, even if he has land or an interest in land, cannot maintain that the covenant was taken to protect land. Buckley, L.J., stated in *L. C. C.* v. *Allen*, [1914] 3 K. B. 642, at p. 660, that the plaintiff must not merely have land, but must have land "*capable of enjoying* as against the land of the covenantor, the benefit of the restrictive covenant": see III, § 9.

2. *Covenants against businesses injurious to land.*

The content of the covenant itself often discloses the purpose for which it was taken, and whether, therefore, it ought to be considered as capable of binding the land or as collateral. In the following examples, the inference is that land is to be protected:

(i) the long lists of offensive businesses set out nominatim in many old covenants: it cannot be supposed that the covenantee is carrying them all on himself, and is taking the covenants for his protection as a trader;

(ii) covenants against all trades and businesses, even if one or two, for example, professions, are permitted by exception;

(iii) covenants against trades and businesses qualified by words, such as "offensive", "noisy", "noxious", etc., referable to the amenity of the neighbourhood;

(iv) covenants against one or a few trades or businesses which are in fact offensive or relatively so: for example, perhaps, shops for the sale of liquor in a residential area;

(v) where there is a building scheme, the orderly development of the area is in itself a matter of concern. Accordingly, the provision of a "shopping centre", in which only one butcher, baker, grocer, etc., is permitted, would not be collateral, although single, and inoffensive, trades were forbidden.

3. *Covenants against businesses taken for collateral purposes.*

On the other hand, restrictions upon trades and businesses, and especially upon the mode of carrying them on, may be directed to matters purely commercial and devoid of any external effect at all; and the inference from the content of such covenants is that some other interest, and not land, is sought to be protected. A covenant to employ only particular kinds of workmen (for example, only union, or only non-union, men), or a covenant such as that discussed in *Palmolive Co., Ltd.* v. *Freedman*, [1927] 2 Ch. 333, not to sell particular soap below a certain price, would be of this kind. So also would a covenant against the sale of particular articles, or against the sale of goods of a particular class except those made by the covenantee, and a prohibition against a single trade, or group of trades (except if offensive ones or in the building scheme case outlined above).

The surrounding circumstances may determine the question. If the covenantee has no interest in land to be protected, and there is no building scheme, the covenants cannot be enforced against anyone but the original covenantor, whatever their nature. Again, if the covenantee has no business to protect, the covenants could not have been imposed for that purpose. The difficulty only arises where the covenantee has both an interest in land and a business, and where the evidence derived from the content of the covenant is inconclusive.

4. *Leaseholds.*

In the first place, it is plain that if the covenant is one restricting the lessee's user of the demised land, the distinction drawn above

will only be applied in the clearest possible case, for performance on the demised land has long been held to be almost conclusive that the covenant runs under *Spencer's Case*, 5 Co. Rep. 17.

Congleton Corporation v. *Pattison*, 10 East 135, however, was such a case. There the plaintiffs demised land for the erection of a silk mill and took a covenant from the lessee, expressed to be made for himself, his executors, administrators and assigns, not during the term to receive as workmen in the mill any person who had a settlement in any other parish before a certificate of the settlement of such person under 8 & 9 Will. 3, c. 30, should be given to Congleton. The defendant was assignee of the term, and infringed the covenant, whereby the ratepayers of Congleton were damnified. It was held that this covenant was merely for the protection of the rates, and was collateral to the demise; it had not that relation to land required to make it capable of running, although it was contained in a lease, and was intended to run (witness the covenant for assigns): compare *Gorton* v. *Gregory*, 3 B. & S. 90, but contrast *Drew* v. *Guy*, [1894] 3 Ch. 25; *Wills* v. *Adams*, 25 T. L. R. 85. In *Clements* v. *Welles*, L. R. 1 Eq. 200, Romilly, M.R., dealt with the prohibition of a trade which would injure the neighbourhood; but the trade there prohibited was the inoffensive one of a hairdresser, and the learned Master of the Rolls did not think it necessary to find that that trade was detrimental to the neighbourhood.

5. Freeholds.

The matter is less clear, however, in regard to covenants imposed by a covenantee, who has, as well as a business, adjoining land (whether freehold or leasehold). The question is whether in such a case the Court will enquire whether the covenant was taken for the benefit of this land, or for the benefit of the business, or whether it will content itself with bringing the case into apparent conformity with principle, by relying on the fact that this land exists. To this question no satisfactory answer can be given.

On the principles laid down in *L. S. W. Ry.* v. *Gomm* (1882), 20 Ch. D. 562, and in *L. C. C.* v. *Allen*, [1914] 3 K. B. 642, the distinction ought to be applied (*a*). Moreover, occasional references to this topic are to be found in the reports. But most of the cases before 1882 and before 1914 are authority for the contrary. The Court of Appeal in *L. C. C.* v. *Allen* did not expressly carry

(*a*) If a business were sufficient to support a covenant, there would be no reason why a covenant should not run with chattels on sale: see Excursus C, *infra*.

the distinction so far, and indeed explained some earlier cases on somewhat narrow grounds.

6. *Collateral covenants.*

In *Thomas* v. *Hayward*, L. R. 4 Ex. 311, a covenant for the protection of trade was held to be collateral. A lease contained a covenant by the lessor not to build or keep any house for the sale of spirits or beer within half-a-mile of the land demised for use as a public-house. An assign of the lease sued upon this covenant, and a demurrer was upheld, Cleasby, B., saying : " This covenant concerns not the condition of the land itself, but only the value of trade carried on there, and is in that sense collateral." Again, in *Wilkes* v. *Spooner*, [1911] 2 K. B. 473, Isaac Spooner carried on a general butcher's business at No. 170, and a pork butcher's business at No. 137, both being leasehold premises held of different landlords. In 1908 he sold his general butcher's business to the plaintiff and assigned to him the term in No. 170. A covenant not to sell beef or mutton at No. 137 was contained in this assignment. In 1909 he surrendered the lease of No. 137, and a new lease was granted to his son, G. L. Spooner. The covenant was unenforceable against the son by reason of the fact that the landlord had no notice, actual or constructive, of it; and this fact was sufficient for the decision of the case. But Fletcher-Moulton, L.J., said at p. 485 : " I confess that, personally, I feel some doubt whether the covenant upon which the action is based had any reference to the interest of [the defendant] as lessee of No. 137. After reading it, it looks to me rather as though the covenant was made by him as the person who was carrying on that particular business as a pork-butcher, and the word ' assigns ' in this covenant more probably refers to those who in the future might be assignees of that business from him, than to persons who might become assignees of his interest in No. 137." Farwell, L.J., however, stated at p. 486 that he did not share these doubts. In *Cave* v. *Horsell*, [1912] 3 K. B. 533, Fletcher-Moulton, L.J., again adverted to this distinction (at p. 541). In that case, however, the parties were the original covenantee and the original covenantor, so that no question of transmission arose.

7. *Covenants held not collateral.*

On the other hand, there are many cases where it was obvious as a fact that the covenant was one for the protection of trade, but the point that it was for that reason collateral was not taken. For example, in *Stuart* v. *Diplock*, 43 Ch. D. 343, a covenant was

imposed upon adjoining land of a lessor not to permit or suffer to be carried on the business of ladies' outfitting. Persons acting under the lessor opened a "fancy draper's" on part of that land, and were sued by the covenantee's executrix. The case turned upon the extent to which the two trades overlapped, and it was made plain that the plaintiffs' objection was based solely on injury to trade. But no point was made that the covenant was a collateral one, and not binding upon the defendants.

Similarly in *Holloway Bros.* v. *Hill*, [1902] 2 Ch. 612, the plaintiffs frankly admitted that they objected to the defendants' business on account of trade rivalry: cf. *Derby Motor Cab Co.* v. *Crompton*, 81 T. L. R. 185.

Some of these cases can be explained. Thus in *Buckle* v. *Fredericks*, 44 Ch. D. 244, and *L. S. G., Ltd.* v. *Lawrence*, 42 T. L. R. 85, restrictions on particular businesses could be justified by a building-scheme, or a general scheme of development of a similar kind. Again, the various covenants against selling liquor or keeping places for its sale (see V, §§ 12—15) can be treated as being for the protection of adjoining land against a somewhat offensive business. Of one such covenant Jessel, M.R., said: "That was obviously a covenant for the protection of their estate from nuisance. It was not a covenant for the purpose of enabling them, and them only, to carry on the offensive trade": *Kelsey* v. *Dodd*, 52 L. J. Ch. 34, at p. 35.

8. "*Tied houses*".

There remains a body of authority upon the brewers' "tie", which is a restriction very commonly imposed upon licenced premises. It is designed to meet the reluctance of the licensing justices to grant licences to persons not resident on the premises, though nowadays licences are granted more freely to brewing companies, who carry on the business by a manager. It provides that the licensed victualler shall take all his supplies of liquor from a particular brewer. As early as 1869, it was already too late to attack these ties for being in restraint of trade: *per* Selwyn, L.J., in *Catt* v. *Tourle*, L. R. 4 Ch. 654, at p. 658; and accordingly their enforceability otherwise than between covenantor and covenantee depends only upon the law of restrictive covenants. The simple leasehold case arose in *Clegg* v. *Hands*, 44 Ch. D. 503, where the successful plaintiff was the assign (i) of the reversion in the demised public-house, (ii) of the covenant, (iii) of the lessors' brewery business. The judgments therein do not all proceed upon the modern principles governing the running of the benefit of covenants, but the case exemplifies the almost universal rule that

a covenant is one "touching and concerning the thing demised" if it is performed thereon; and as such it was enforced by the reversioners. And that it is by virtue of having the reversion that a plaintiff can enforce such a covenant is well illustrated by *White* v. *Southend Hotel Co.*, [1897] 1 Ch. 767. There the reversion upon the term was vested in the personal representatives of the lessor, and the lessor's wine and spirit business (to which the hotel was tied) had been sold by them to a third party. Nevertheless the covenant to take supplies only from that business was enforceable against the lessee's assigns by the lessor's personal representatives, and the former were entitled to an abatement of rent provided for in the lease so long as they observed the covenant. The position as to such ties on leasehold premises is thus a simple one; they are enforceable by the reversioner on the ground that they "touch and concern the thing demised". It remains, however, to consider the few decided cases of such ties where the relationship of lessor and lessee did not exist.

In *Catt* v. *Tourle*, L. R. 4 Ch. 654, Catt, a brewer, sold land to a land society with such a tie. The defendant purchased from the land society with notice; and the Court of Appeal in Chancery, overruling a demurrer, granted an injunction at the suit of Catt restraining him from getting his supplies of liquor from elsewhere. The position of the parties was exactly that of the parties in *L. C. C.* v. *Allen*, [1914] 3 K. B. 658, and in the latter case Buckley, L.J., stated, at p. 658, his view that the case was wrongly decided if the plaintiff had no retained land to be benefited (a fact which nowhere appears from the report).

In *Johns Bros.* v. *Holmes*, [1900] 1 Ch. 188, the tie was imposed for the benefit of a firm of brewers who were second mortgagees and was for a period of fourteen years, and only so long as the second mortgage was on foot. The brewers sold their business and assigned the second mortgage to a company, who were held by Kekewich, J., entitled to enforce the tie against assigns of the mortgagor. The case could have been put as a lessor-lessee one, since the mortgagors attorned tenant to the mortgagee; but this was not relied on. Kekewich, J., said at p. 196: "The covenant must be regarded as having been made for the benefit of the business. *Conveyancing forms* do not admit of a covenant being entered into with a business, but this is what the draughtsman has attained in another way." This *dictum* indicates with bluntness the anomalous character of the tie. It is plainly a covenant for the protection of trade, even when there is a leasehold reversion or adjoining land vested in the covenantee which can be described as protected. Accordingly the cases on the subject can at best be

brought into apparent conformity with principle, and that only if the cases where the tie is enforceable otherwise than between the original covenanting parties are confined to those where there is land or an interest therein which can be so described. *Luker* v. *Dennis*, 7 Ch. D. 227, fails to pass even this test. There the covenantor took a lease of the Sutton Arms from the covenantee, and covenanted to take from him all his supplies of liquor not only at the Sutton Arms but also at the Milton Arms (which he held of another landlord). The covenantee succeeded in enforcing this tie against an assign of the Milton Arms. Neither the covenantee's brewery business nor his lessor-lessee relationship to the covenantor in regard to other land can be considered sufficient grounds to support this decision. "It cannot, I think, be relied on as now accurately stating the law": *per* Buckley, L.J., in *L. C. C.* v. *Allen*, [1914] 3 K. B. 642, at p. 659.

9. *Conclusion.*

The conclusion drawn from the cases on this subject must therefore be provisional. It is submitted, however, that it is at any rate open to a defendant to argue, in a case where there is no privity of contract, nor of estate in the burdened land, between himself and the plaintiff, that a particular covenant was imposed for the benefit of the covenantee's business interests, and as such is collateral, and ought not to be enforced under the rule in *Tulk* v. *Moxhay*, 2 Ph. 774.

Excursus C.

Covenants Binding Chattels.

At the time when the doctrine of restrictive covenants was based solely on notice, there was no reason why it should not be applied to chattels and pure personalty in exactly the same way as to land. Knight-Bruce, L.J., was prepared so to apply it:—

"Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the seller": *De Mattos* v. *Gibson*, 4 De G. & J. 276, at p. 282.

By the time that *L. C. C.* v. *Allen*, [1914] 3 K. B. 642, was decided, however, the application of *Tulk* v. *Moxhay* was confined

to cases where the plaintiff sought to restrict the user of the defendant's land for the protection of an interest in land of his own. The doctrine so stated could only have a very much limited application to pure personalty.

It is possible for different persons to have concurrent interests in chattels, or at any rate in some chattels, and certainly in other kinds of personal property. It is not, however, possible for chattels or items of personal property to be necessarily or inseparably contiguous or adjoining: they are by nature movables. The modern position is accordingly as follows:—

(1) Where one person has an interest in another's chattel, and the instrument creating the interest, or another instrument, contains a covenant restricting the user of the chattel, that covenant binds successive owners of the chattel for the protection of the covenantee's interest therein. The analogy is to covenants contained in a lease, and to be performed on the land demised. Thus in *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.*, [1926] A. C. 108, the Judicial Committee of the Privy Council held that a ship was bound in the hands of successive owners of it by a charterparty of which they all had notice. The judgment delivered by Lord Shaw covered a wide field, but after reviewing the cases of covenants affecting land he thus put the point at p. 121: "The person seeking to enforce such a covenant must of course have, and continue to have, *an interest in the subject-matter* of the contract".

(2) Upon an out-and-out sale of a chattel, however, a covenant cannot usually be imposed upon it so as to bind successive owners: *Taddy* v. *Sterious*, [1904] 1 Ch. 354; *McGruther* v. *Pitcher*, [1904] 2 Ch. 306. Here there is a close analogy to restrictive covenants affecting freehold land. The covenantee is necessarily unable to show that he has anything capable of being protected, analogous to adjoining or neighbouring land. The cases cited show that a *business* is not sufficient to fulfil this requirement in the case of a chattel any more than it is to fulfil it in the case of land: see Excursus B, *supra*.

(3) Somewhat different considerations apply to the monopolies vested in patentees or the owners of copyright, for such persons possess an interest in the patent or the copyright capable of being protected by restrictions upon the free use of goods manufactured under the patent, or reproductions of the copyrighted work, and particularly upon their resale under a certain price. Thus, when an article is manufactured under a patent, it only finds its way into the market by virtue of a licence from the patentee (express or implied). Successive owners of it can only deal with it under

that licence, and must conform to any conditions it contains, and of whose existence they have notice: else they have no defence to an action for infringement. "Such a case would not depend upon any condition *running with or attaching to* the article. It would depend only upon the limits of the licence which the patentee had granted when he first parted with the goods": *per* Cozens-Hardy, L.J., in *McGruther* v. *Pitcher*, at p. 312.

The relation between the patent or the copyright and such goods or reproductions is a unique one (*a*), and, so far as conditions imposed *by* the patentee or copyright-owner upon the free user of the goods or reproductions are concerned, these monopolies constitute a genuine exception to the rules ((1) and (2), *supra*) which apply to other items of personalty. Those rules, however, apply fully to conditions attempted to be imposed upon the sale of the patent or the copyright itself. Thus in *Barker* v. *Stickney*, [1918] 2 K. B. 356; [1919] 1 K. B. 121, certain covenants for the benefit of the author were inserted in an assignment of copyright. He was unable to enforce them against subsequent assigns of the copyright, because no interest therein was reserved to him : cf. *Bagot* v. *Clipper Pneumatic Tyre Co.*, [1902] 1 Ch. 146, explaining *Wedermann* v. *Société Générale d'Electricité*, 19 Ch. D. 246. In *Macdonald* v. *Eyles*, [1921] 1 Ch. 631, however, an interest in the copyright had been conferred on the plaintiffs, who had accordingly a right of action against assigns of it, to protect their interest. In that case, Peterson, J., said at p. 641 : "If, in *Barker* v. *Stickney*, the royalties payable to the author . . . had been charged upon . . . the copyright, so that the author had in this way *an interest in the copyright which he was entitled to protect*, the decision would have been in favour of the author."

(*a*) The restrictions upon the transfer of shares in a private company imposed by its articles are not to be considered as restrictions imposed upon an otherwise freely saleable piece of property : they are part of the series of mutual covenants which go to compose the complex known as a share : see *I. R. C.* v. *Crossman*, [1937] A. C. 26.

(*To be continued.*)

CONDITIONS OF SALE OF LAND.

By E. O. Walford, LL.D., Solicitor.

(*Continued from p.* 76.)

Law Society's Condition.

Reservations for Benefit of Vendor's Lands.

26.—Where the property or any part thereof adjoins or faces or is neighbouring to any other land of the vendor (whether intended to be retained or to be sold by him), a purchaser of the property shall not become entitled to any easement or right of light or air or other easement or right which would restrict or interfere with the free use of such other land by the vendor or any person deriving title under him for building or any other purposes. The conveyance shall contain a reservation or provision for giving effect to this condition, and, in the case of registered land, an application shall, at the cost of the person requiring the entry, be made to the registrar to enter a notice of the reservation in the register.

In the absence of special agreement a vendor who retains land adjoining the land sold cannot develop the land which he retains by building so as to obstruct ancient lights existing in buildings erected on the land sold. "If the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant": *per* Thesiger, L.J., in *Wheeldon* v. *Burrows*, 12 Ch. D. 31. This doctrine is not confined to cases in which light has flowed to windows in the land sold for upwards of twenty years, and which would thus (but for common ownership of the property) enjoy a legal easement of light in respect thereof. The presumption is that the privileges enjoyed *de facto* are granted by the vendor to the purchaser anew by way of legal easement. It is not necessary for the purchaser to show that the light enjoyed is enjoyed as of right: the windows may have been put in very recently: *Palmer* v. *Fletcher* (1663), 1 Lev. 122.

The nature of the implied grant is, however, governed by the circumstances and the common intention of the parties: *Birmingham, etc. Banking Co.* v. *Ross*, 38 Ch. D. 295; *Pwllbach Colliery Co.* v. *Woodman*, [1915] A. C. 634; *Quicke* v. *Chapman*, [1903] 1 Ch. 659.

There is no implied reservation of a right of light in favour of the vendor when he sells land and retains an adjoining house: *White* v. *Bass*, 7 H. & N. 722; *Wheeldon* v. *Burrows* (*supra*); *Ray* v. *Hazeldine*, [1904] 2 Ch. 17. The vendor may, however, sell both land and an adjoining house to different persons concurrently. In that case the vendor is presumed to grant to the purchaser a right of light in respect of the windows in the house, and the purchaser of the land takes the land subject to that right: *Palmer* v. *Fletcher*, 1 Lev. 122; *Allen* v. *Taylor*, 16 Ch. D. 355. Lastly, if two adjoining houses are sold by a common vendor the presumption is that a right of light is granted to each of the purchasers in respect of the windows existing in such houses: *Russell* v. *Watts*, 25 Ch. D., at p. 573; *Allen* v. *Taylor* (*supra*).

In view of these decisions the object of the condition above set out will become apparent. Where the vendor retains adjoining land it is clear that he will not wish to burden it with an obligation to refrain from developing it by the erection of buildings, even if such development should interfere to some extent with the access of light to the property sold. On the other hand the purchaser may well have to consider whether he is prepared to agree to the exception. In this connection the position of the house or other buildings on the land purchased, and the provisions of any local town planning, may be material for consideration. It is, however, submitted that the attention of the purchaser should be directed by his adviser to any such reservation.

If it is uncertain whether the land retained will be fully developed at an early date, it may be necessary for the vendor to extend the operation of the condition. Such a condition does not prevent the purchaser from acquiring by prescription a right of light to windows in any building erected on the land purchased. It merely prevents him from objecting to any interference with light which occurs prior to the expiry of the statutory period.

Section 3 of the Prescription Act, 1832, is to the following effect. When the access of light to any dwelling-house, workshop or other building has been actually enjoyed therewith for twenty years without interruption, the right thereto becomes absolute and indefeasible, unless it appears that such access and use of light was enjoyed by some consent or agreement expressly made or given for that purpose by deed or in writing.

I. The following exceptions have been held not to amount to such a consent or agreement:—

(1) Exception of rights, if any, restricting the free use of any adjoining land or the conversion or appropriation at any time thereafter of such land for building or other purposes, obstructive or otherwise: *Mitchell* v. *Cantrill* (1887), 37 Ch. D. 56.

(2) Exception of "any easements or implied easements of light and air" over adjoining land: *Hapgood* v. *Martin & Son, Ltd.* (1934), 152 L. T. 72.

In such cases the grantee of the land could, therefore, acquire by prescription after the date of the assurance an indefeasible right of light so as to prevent the grantor thereafter from erecting new buildings or altering existing buildings on adjoining land in such a manner as to obstruct materially the access of light to the windows in question. It is not meant to imply that an injunction will necessarily be granted. In such cases (as in all other cases of infringement of rights of light) damages may in certain cases be considered to be a sufficient remedy: *Fishenden* v. *Higgs & Hill, Ltd.* (1935), 153 L. T. 128.

II. On the other hand, the following provisions have been held to constitute a consent or agreement precluding the acquisition by the grantee of the land of prescriptive rights to light:—

(1) Reservation of power for the lessors to deal as they thought fit with adjoining or contiguous premises, and to erect or suffer to be erected on such adjoining or contiguous premises any buildings whatever whether they should or should not affect or diminish the light or air enjoyed by the lessee: *Haines* v. *King*, [1893] 3 Ch. 439.

(2) Reservation of full right to build to any height on the adjoining land notwithstanding obstruction of light: *Foster* v. *Lyons*, [1927] 1 Ch. 219.

(3) Exclusion of any rights of light or other easements over other ground or premises and subject to adjacent buildings or any of them being at any time or times rebuilt or altered: *Willoughby* v. *Eckstein*, [1937] 1 All E. R. 257.

An appropriate condition achieving this result is as follows:—

"The sale is subject to the right (which shall be reserved to the vendor and his sequels in title in the conveyance) of rebuilding or altering any of the adjoining or neighbouring buildings and of erecting any new buildings or erections on any adjoining or neighbouring land in such manner as the vendor or his sequels in title may think fit notwithstanding any interference occasioned thereby to the access of light or air to the land hereby agreed to

be sold or to any windows, openings or lights from time to time existing in any buildings or other erections now or hereafter standing on the land hereby agreed to be sold. [And the conveyance shall contain a declaration that the access of light and air to any such windows, openings or lights shall be deemed to be enjoyed by the consent of the vendor and his sequels in title and not as of right.] "

The words in square brackets do not appear to be essential having regard to the decisions above referred to, but may be inserted *ex abundante cautela.*

Registered land.

As to entry of the requisite notice of the reservation in the Register, the simplest method of carrying into effect this condition is to insert in the transfer a statement that " the transferor and the transferee hereby apply to the Registrar to enter notice of the foregoing reservation [and declaration] in the Register affecting the title above referred to ".

Law Society's Condition.

Sales Subject to Existing Covenants.

27.—(1) Where—

(i) the vendor, or

(ii) the estate of any testator or intestate, of whom the vendor is personal representative, or

(iii) any trust estate, of which the vendor is trustee,

will, after the completion of the purchase, remain liable in respect of a breach of—

(a) any existing restrictive covenant or stipulation affecting the property sold, or

(b) any existing positive covenant or provision relating to the property sold,

then, if the property is, in the contract, expressed to be sold subject to any such covenant, stipulation or provision, the purchaser shall, in his conveyance, covenant thenceforth to observe and perform the same, and keep the vendor and his estate and effects, or the estate and effects of such testator or intestate, or the trust estate, as the case may be, indemnified from all claims in respect of the said covenant, stipulation or provision, so far as the same relates to the property conveyed to him:

(2) Provided that, unless the vendor or such estate as aforesaid is interested in the observance or performance of such existing covenant, stipulation or provision, the covenant by the purchaser shall be by way of indemnity only.

(3) Where any such covenant by the purchaser affects registered land, an application shall, at the cost of the person requiring the entry, be made to the registrar to enter notice thereof in the register.

Condition 27 (1).

It will be seen that the above paragraph applies only "if the property is, in the contract, expressed to be sold" subject to restrictive covenants or other provisions in respect of which the vendor or any estate which he represents as personal representative or trustee will remain liable after completion of the purchase.

If the covenant in question is negative in nature, *i.e.*, is a covenant restrictive of the user of the property, it may well be that the covenant entered into by the vendor, or the testator or settlor whom he represents as trustee, contains a proviso stating in effect that the covenantor and his successors in title respectively shall only be liable in damages in respect of any breach occurring whilst they shall respectively retain an interest in the property. Clearly Condition 27 (1) will not apply to such cases, for the proviso will operate automatically to release the vendor.

If, however, the covenant, though solely restrictive and not imposing any positive obligation upon the covenantor, contains no such proviso, then Condition 27 (1) will apply, and the vendor will be entitled to require the purchaser to enter into an express covenant with him to perform the restrictive covenant and to indemnify him from liability in respect of any breach.

Where the covenants in question impose positive obligations on the vendor there will normally be no proviso limiting the liability of successive owners, since such covenants cannot be made to run with the land, and are only enforceable against the covenantor and his estate, so that a similar covenant will be appropriate in such cases.

Even in the absence of a condition to that effect a purchaser who buys with notice of restrictive covenants can only enforce specific performance upon the condition that he enters into a covenant to indemnify the vendor against any breach of those covenants: *Moxhay* v. *Inderwick* (1847), 1 De G. & Sm. 708; *Re Poole & Clarke's Contract*, [1904] 2 Ch. 173. And where the contract provides that the purchaser was to erect and maintain

certain fences, but does not provide for any covenant to that effect in the conveyance, the vendor may require such covenant to be inserted in the conveyance: *Re Cooper & Crondace's Contract* (1904), 90 L. T. 258.

Condition 27 (2).

If the vendor is not interested in the performance of the covenants he is entitled under this paragraph only to a covenant by way of indemnity. The covenant, in form settled in *Re Poole & Clarke's Contract*, [1904] 2 Ch. 173, will be made with the vendor "with the object and intention of affording to the vendor his executors and administrators a full and sufficient indemnity but not further or otherwise".

If the vendor is interested in the continued performance of the covenants it will be well for him to make this fact clear in the contract and to provide that the purchaser shall covenant with the vendor to perform and observe the covenants in question not only by way of indemnity but also as a separate covenant with the vendor for the benefit of defined land retained by him. The importance of this point is exemplified by the case of *Reckitt* v. *Cody*, [1920] 2 Ch. 452. A sold to B certain property subject to certain covenants already affecting the land, and B covenanted with A to perform those covenants so far as they were subsisting. There was no evidence establishing a bargain between the parties that the covenant was to be taken for the benefit of remaining land of the vendor. Although the vendor in fact retained neighbouring land capable of being benefited, it was accordingly held that B's covenant operated by way of indemnity only, although not so limited in form. See also the notes following Condition 28.

Condition 27 (3).

This paragraph also is confined to cases in which there are existing covenants and the purchaser is under an obligation to covenant with the vendor to perform and observe such covenants by virtue of the operation of Condition 27 (1). This paragraph appears to throw upon the vendor the expense of any application to the Registrar to enter notice on the Register of the purchaser's covenants if required by the vendor. It is, however, a common practice to provide in the contract that the transfer shall contain an application by the purchaser to the Registrar to enter notice of the purchaser's covenants, particularly when they are not by way of indemnity only but also for the benefit of adjoining land retained by the vendor.

Law Society's Condition.

IMPOSITION OF RESTRICTIVE OR OTHER COVENANTS.

28.—(1) Where the contract provides that any restrictive or other covenant or stipulation shall be imposed on the property or any part thereof, or entered into by a purchaser, he shall, in the conveyance, covenant with the vendor and, if so required, with any legal mortgagee joining in the conveyance, that the purchaser and the persons deriving title under him to the property intended to be affected, will, for the benefit of the property for which the covenant or stipulation is made, observe and perform the same.

(2) Where the contract provides that the liability for a breach, by any owner of the property intended to be affected by any restrictive covenant or stipulation, shall cease, if the breach occurs after he has parted with all his interest in the property in regard to which the breach occurs, a provision to that effect shall be inserted in the conveyance; but that provision shall not extend to the liability of a purchaser, and his estate and effects, as respects the breach of any positive covenant or stipulation.

Condition 28 (1).

It would seem that in the absence of any special condition the obligations of the purchaser would be as stated in this paragraph, except with regard to the special provision that the purchaser shall covenant not only with the vendor but also with any legal mortgagee joining in the conveyance. By virtue of Condition 33 of the Law Society's Conditions, the expression "legal mortgagee" has the same meaning as in section 205 (1) (xvi) of the Law of Property Act, 1925, namely, a mortgagee by demise or sub-demise or a chargee by way of legal mortgage.

The condition provides for the annexation of the covenant to the land intended to be benefited thereby. The importance of defining such land in the contract and in the conveyance was clearly established by earlier authorities, such as *Renals* v. *Cowlishaw* (1879), 9 Ch. D. 125, and *Torbay Hotel, Ltd.* v. *Jenkins*, [1927] 2 Ch. 225. More recent cases emphasise the necessity for establishing that the land to which the benefit of the covenant is annexed must be sufficiently close to the burdened land to be capable of benefiting from the observance of the covenant. Thus if covenants are taken for the benefit of *the whole of* a very large

estate with the result that some of the more distant parts cannot be materially affected by a breach of those covenants, the benefit of the covenant cannot run with the whole estate: *Re Ballard's Conveyance*, [1937] Ch. 473. It was further laid down in the same case that it was not possible in such a case to treat the covenants as benefiting that part of the estate which might in fact derive benefit from it. This decision led to the assumption, which is no doubt warranted, that many covenants purporting to be taken for the benefit of large estates are unenforceable against subsequent purchasers. In *Zetland* v. *Driver*, [1937] Ch. 651; 106 L. J. Ch. 379, restrictive covenants had been taken for the benefit of the whole *or any part or parts* of the vendor's unsold estate. Bennett, J., considering himself bound by *Re Ballard's Conveyance* (*supra*), held that the benefit of the covenants did not run with the covenantee's land. On appeal ((1938), 107 L. J. Ch. 316) the Court of Appeal, without expressing any opinion as to the accuracy of *Re Ballard*, overruled the decision of Bennett, J., upon the ground that the covenant was taken for the benefit of the whole *or any part or parts* of the unsold estate. Whilst this decision *appears* to afford a simple formula for the avoidance of the difficulty above mentioned, Farwell, J., delivering the judgment of the Court of Appeal, observed:—

(a) That the land which is intended to be benefited must be so defined as to be easily ascertainable, and the fact that the covenant is imposed for the benefit of that particular land should be stated in the conveyance and also the persons entitled to enforce it.

(b) The land retained by the vendor must be such as to be capable of being benefited by the covenant at the time when it is imposed.

Moreover, the facts in *Zetland* v. *Driver* were very special. First, the prohibited matters were such as in the opinion of the covenantee or his successors in title constituted a nuisance. Secondly, the benefit of the covenants was not to pass to a purchaser of any part of the covenantee's land in the absence of an express assignment. Further, the Court of Appeal refrained from approval or disapproval of *Re Ballard's Conveyance*. Accordingly it is suggested that pending a further elucidation of the position practitioners will be well advised, when framing conditions of sale, to define as precisely as possible the land which is intended to be benefited, the persons who are to be entitled to enforce the covenants, and to advise clients to limit the "benefited" land so that no part of it may be so remote as to be incapable of being benefited by the covenants which are being

imposed. Whilst it will be desirable, where practicable, to define the benefited land by reference to a plan or by inserting specific measurements, this is not essential as a matter of law. If the covenants are expressed to be for the benefit of all or any of the vendor's lands adjoining or near to the burdened land, this will be sufficient if the land thus referred to can be readily identified. One objection to such a formula is that where the vendor owns scattered parcels of land in the neighbourhood, identification of the parts benefited may be difficult. Another objection is that as time passes it may be a matter of even greater difficulty to determine what land remained vested in the vendor at the date when the covenants were exacted and who now owns that land or the various parts thereof, and can enforce or release the covenants.

Definition of the "benefited" land by field numbers taken from the ordnance map may form a solution where such land is extensive and the attachment to the contract of a very large plan would otherwise be necessary.

It is hardly necessary to mention that positive obligations cannot be made to run with the burdened land or the land which is benefited thereby; see, *e.g.*, *Haywood* v. *Brunswick Building Society* (1881), 8 Q. B. D. 403.

The necessity of registering as a land charge any such restrictive covenant should not be overlooked.

Condition 28 (2).

The portion of this paragraph which stipulates that where the contract provides, in effect, that the purchaser's liability under a covenant is to cease when he parts with the property a provision to that effect is to be inserted in the conveyance relates only to negative covenants. In general the covenantee's remedy is by way of action for an injunction with which may be joined a claim for damages, and the original covenantor may therefore suffer loss after he has parted with the land if his liability is not limited to the period of his ownership. As to the remedy by way of injunction, it has long been settled that this remedy is only available against persons in occupation of the land and who accordingly have it in their power to observe the injunction without taking legal proceedings: *Hall* v. *Ewin*, 37 Ch. D. 74.

Where the original covenant contains no proviso limiting the liability of the covenantor to the period of his ownership, the solicitor acting for a subsequent purchaser not infrequently inserts in the covenant by his client to perform the original covenants a new proviso limiting his client's liability to the period of his ownership. This practice is clearly incorrect. Such a proviso has

no place whatever in a covenant by way of indemnity. The position is as follows:—

(1) If the original covenant contains a proviso limiting the liability of the covenantee to the period of his ownership the vendor requires no indemnity.

(2) If no such proviso was contained in the original covenant the vendor will not be released from personal liability in damages on parting with the land. He therefore requires an unqualified indemnity, the appropriate form being that settled in *Re Poole & Clarke's Contract*, [1904] 2 Ch. 173, *i.e.*, a covenant by the purchaser with the vendor "with the object and intention of affording to the vendor a full and sufficient indemnity" in respect of the covenants, "but not further or otherwise". It will be seen that Condition 28 (2) of the Law Society's Conditions provides that the limitation of the purchaser's liability to the period of his interest in the property is not to extend to any positive covenant or stipulation. It is clear that where the purchaser is to enter into some positive obligation such as a covenant to erect buildings his covenant might be valueless if he could escape liability by conveying away the property, possibly on the following day. In that case neither he nor the person to whom he conveyed the property would be under any liability to perform the covenant. As, however, the provision which is now being considered is by way of qualification of the earlier part of Condition 28 (2), which deals only with cases where the contract provides for the qualification of the purchaser's covenant in a certain manner, it is thought that the draftsman has overlooked the opening words of paragraph 2 of Condition 28 when settling the concluding portion of that paragraph. If the contract mistakenly provided that the purchaser should be under no further liability in respect of positive obligations as well as restrictive covenants after parting with his interest in the property, it can hardly be thought that the concluding words of this condition would remedy the matter. Moreover the special conditions usually provide that these general conditions apply only so far as they are not varied by or inconsistent with the special conditions.

Imposition of restrictive covenants upon the vendor's land.

Although this condition does not deal with cases in which the vendor agrees to restrict the user of the land retained, it occasion-

ally happens that the vendor is willing in consideration of the covenants entered into by the purchaser to restrict the user of the land retained by him or part of it. The foregoing observations as to the necessity for defining with precision the land intended to be benefited and burdened respectively apply with equal force.

Any such restrictive covenant must, of course, be registered as a land charge under the Land Charges Act, 1925.

A purchaser (other than a lessee or mortgagee) of land not registered at the Land Registry may now insist (notwithstanding any stipulation to the contrary) that there should be endorsed on or (where impracticable) permanently annexed to one document selected by the purchaser but retained by the conveying party and being part of the common title, a memorandum giving notice of any provision in the conveyance restrictive of user of or giving rights over any other land comprised in the common title: L. P. Act, s. 200 (1). The omission of such requirement does not prejudice the title of the purchaser (L. P. Act, s. 200 (2)); but nothing in the section affects the purchaser's obligation to register a land charge in respect of—

(a) any restrictive covenant or agreement affecting freehold land; or

(b) any estate contract; or

(c) any equitable easement, liberty or privilege.

(L. P. Act, s. 200 (4).)

Law Society's Condition.

DUPLICATE CONVEYANCES, ETC., BY PURCHASERS.

29.—(1) Where, by reason of any covenant, reservation or otherwise, a purchaser is bound to execute the conveyance, he shall, at the option of the vendor, either—

(a) execute a duplicate, or

(b) save where the conveyance is lodged at the land registry, give to the vendor a separate acknowledgment of his right to production of the conveyance, and delivery of copies thereof, and, unless the purchaser is in a fiduciary position, an undertaking for the safe custody thereof.

(2) The duplicate or the acknowledgment, and (where given) the undertaking, shall be prepared, engrossed and stamped, by and at the expense of the vendor, but the purchaser shall approve and execute the same, free of expense to the vendor.

(3) Where any duplicate is executed, the purchaser shall, if required, produce the original duly stamped, to enable the stamp on the duplicate to be denoted.

Condition 29 (1) *and* (2).

This paragraph gives the vendor the option of obtaining a duplicate of the conveyance or an acknowledgment of his right to production and delivery of copies of the conveyance, but not both a duplicate and an acknowledgment. If the vendor elects to take an acknowledgment he may also require an undertaking for safe custody unless the purchaser is a trustee or otherwise in a fiduciary position. It is clear that the Court when considering in what form a covenant for production should be given by a purchaser will have regard to the question whether he is in a fiduciary position. Thus, where trustees purchasing under the power conferred by the will of their testator had agreed to give to the vendor a "proper and sufficient" covenant for production of title deeds delivered to them by the vendor, it was held that they could only be required to covenant for their own acts: *Onslow* v. *Londesborough* (1852), 10 Hare 67. Whilst there appears to be authority upon the point it is conceived that in the absence of any special condition a vendor could not require a purchaser either to execute a duplicate of the conveyance or to give an acknowledgment of the vendor's right to production or delivery of copies of the conveyance.

It would seem that under paragraph 1 (b) of the above condition, if the vendor inserts in the draft conveyance an acknowledgment the purchaser may refuse to allow its retention, but that if it is allowed to remain in the conveyance the vendor may insist upon a duplicate conveyance or a separate acknowledgment, since the condition clearly contemplates a document which will be handed over to the vendor.

It will be noted that the vendor must content himself with a duplicate of the transfer where the property is registered or will be compulsorily registrable on completion, since the transfer is necessarily lodged at the Land Registry in such cases. If the conveyance is in fact lodged at the Land Registry by the purchaser for the purpose of voluntary registration of the title, the condition does not expressly cover the position, but it is submitted that the words "lodged at the Land Registry" mean "is necessarily lodged at the Land Registry for the registration of the purchaser's title". The condition refers to "conveyances"; but by virtue of Condition 33 "conveyance" in the case of registered land means the instrument of transfer.

Condition 29 (3).

Except as to counterparts of leases or tenancy agreements (when executed by the lessee or tenant only), it is necessary, as practitioners will be aware, to lodge with the stamping authorities the original deed when presenting a duplicate thereof for stamping. The duplicate will be impressed with a five-shilling stamp or such smaller duty as may be attracted by the original deed. This paragraph enables the vendor to require such lodgment.

As to the effect of statutory acknowledgments and undertakings relating to the production and safe custody of deeds, see the observations following the next condition.

Law Society's Condition.

DOCUMENTS, ACKNOWLEDGMENTS, ETC.

30.—(1) With regard to the rights of purchasers in respect of documents of title (not being documents of record or documents which the vendor or his mortgagee or trustee is entitled to retain), the following provisions shall have effect—

(a) If any such document relates to more lots than one, then, if all the lots to which it relates are sold at the auction or within one month thereafter, it shall, on completion of the sales of all such lots, be delivered to the purchaser, whose purchase money is the largest, or in case of equality, to such one of the purchasers as the vendor shall think fit.

(b) In any case to which the foregoing paragraph (a) applies, the vendor, or other holder thereof, shall retain the document until the completion of the sales of all the lots to which it relates, and he shall (if required) give to any purchaser of a lot affected a statutory acknowledgment of the right to production and to delivery of copies, and (unless he is in a fiduciary position) a statutory undertaking for the safe custody, of any document retained by him.

(2) Where a document is retained in the possession of a mortgagee, trustee, or personal representative, a purchaser shall be satisfied with an acknowledgment of the right to production and to delivery of copies from the person having the possession thereof, without any undertaking or covenant for safe custody from him or any other person, save that if a mortgagor, not being in a fiduciary position, concurs in a

conveyance, he shall, if so required, covenant that if and when he receives the document he will, at the cost of the person requiring it, give an undertaking for the safe custody thereof.

(3) The vendor shall not be required to procure the production or delivery, or to trace or state who has the possession of any document, not in the possession or under the control of the vendor or his mortgagee or trustee, nor, save at the expense of the purchaser, to supply in relation thereto any information not within his knowledge.

The statutory provisions material to acknowledgments and undertakings for safe custody and the right to retain documents may be stated as follows:—

(1) The vendor's inability to furnish a purchaser with an acknowledgment of his right to production and delivery of copies of documents of title or with a legal covenant to produce and furnish copies of such documents gives the purchaser no right to object to the title if the purchaser will on completion have an equitable right to the production of such documents: L. P. Act, 1925, s. 45 (7). As to this "equitable right" to production of documents, the rule is stated in Dart (7th ed.), p. 483, as follows: "Generally, every person who has an interest in the land has an equitable right to the production of all deeds which affirmatively prove his title, but not to those which do not. It is a general principle in Equity that a person shall not be compelled to produce his title deeds merely to gratify the curiosity of a person having no estate or interest in the property to which they relate." And later (pp. 483 and 484): "Where a portion of an estate has been sold by the owner, who retains the deeds, the purchaser can, it appears, enforce their production upon a resale, unless there was an understanding to the contrary; which would probably be implied from the circumstances of the title not being investigated upon the original sale."

(2) The effect of acknowledgments and undertakings for safe custody is dealt with by section 64 of the L. P. Act, 1925, as follows:—

Acknowledgments.

(a) In order to have effect under this section the acknowledgment must be given by a person who retains possession of the documents and must be an acknowledgment in writing of the right of another person "to production of those documents, and to delivery of copies thereof": section 64 (1).

It will be seen that unless the acknowledgment gives the right not only to production but also to delivery of copies it will not have effect under the section, and will therefore presumably only operate as an acknowledgment personal to the other party. In the absence of consideration it would presumably be unenforceable. It seems unfortunate that the wording of section 9 (1) of the Conveyancing Act, 1881, has been followed in this respect, particularly as the point had previously been noticed by conveyancers: see, *e.g.*, Key & Elphinstone's Precedents (9th ed.), Vol. I, p. 485.

(b) The burden of the acknowledgment passes to each person in possession of the documents from time to time, but binds the party giving the acknowledgment and each successive possessor only so long as he has possession or control of the documents: section 64 (2).

(c) Each possessor is absolved from liability if prevented from performing his obligations by fire or other inevitable accident: section 64 (2). This provision appears to suggest that the person giving the acknowledgment will be liable in damages if unable to produce the deeds or to supply copies owing to such occurrences as destruction of the deeds owing to other risks, or owing to accidents which might easily have been avoided; but in point of fact an acknowledgment does not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates *from whatever cause arising*: section 64 (6). Apparently the person giving the acknowledgment might, without incurring liability, destroy the documents himself, if so minded.

(d) The obligations of the person giving the acknowledgment are, broadly, to produce the documents at all reasonable times anywhere in the United Kingdom, and to deliver copies or extracts attested or unattested: section 64 (4).

(e) The costs and expenses in connection with the performance of such obligations are payable by the person requesting such performance: section 64 (5).

(f) All persons claiming through or under the person to whom the acknowledgment is given (except a lessee at a rent so claiming) can take advantage of the acknowledgment: section 64 (3).

Undertakings for safe custody.

(a) The obligation of a person giving an undertaking for safe custody is to keep the documents safe, whole, uncancelled

and undefaced, unless prevented from so doing by fire or other inevitable accident: section 64 (9).

(b) In this case damages for loss or destruction of, or injury to, the documents can be recovered: section 64 (10). It seems that a person giving such an undertaking would not be liable in damages if unable to perform his obligations owing to the document being stolen or destroyed by the deliberate wrongful action or carelessness of a third party or by "act of God", provided that he had exercised all reasonable precautions. It is somewhat difficult to determine the exact circumstances in which liability would be incurred. The test suggested by James, L.J., in *Nugent* v. *Smith*, 1 C. P. D., at p. 444, in connection with the immunity of a common carrier in respect of "acts of God", was whether the accident "could not have been prevented by any amount of foresight, pains and care reasonably to be expected". If this test is adopted when considering whether an event is an "inevitable accident" it would seem to put the obligations of the person giving the undertaking rather high; but the words "any amount of foresight, pains and care", when read in conjunction with the words "reasonably to be expected", will be seen only to involve the simple proposition that the covenantor must take reasonable care of the deeds. The decisions dealing with "inevitable accident" are mostly confined to cases of collision between vessels or between vehicles. The rule deducible from those decisions is that an inevitable accident is one which could not possibly be prevented by the exercise of ordinary care, caution or skill: *The Marpesa*, L. R. 4 P. C. 212, 220; *The Merchant Prince*, [1892] P. 179.

The word "accident" is not a technical legal term with a clearly defined meaning; but with reference to legal liability "accident" means any unintended and unexpected occurrence: *Fenton* v. *Thorley*, [1903] A. C. 453.

(c) The obligation of the undertaking runs with and binds each successive holder of the documents; but the person giving the undertaking and each subsequent holder is under liability only so long as he has possession or control of the documents to which the undertaking relates: section 64 (9).

(d) It will have been noted that the benefit of an acknowledgment passes automatically to persons claiming through or under the person to whom the acknowledgment has been given; but (either by accident or design) there is no similar

statutory provision regarding undertakings either in the older Conveyancing Act, 1881, or in the L. P. Act, 1925, which merely reproduces the provisions contained in the Act of 1881. It is conceived that it is not the policy of the Legislature to impose liability on the covenantor at the suit of an unlimited number of persons claiming under the person to whom the undertaking is given. As a matter of conveyancing practice it appears always to be assumed without question that the benefit of such an undertaking devolves in the same manner as an acknowledgment. See also Seaborne (9th ed.), p. 229, to the like effect. The writer has not found any sufficient authority for this assumption. No doubt the benefit of an undertaking with "the purchaser his executors administrators and assigns" would be assignable, but that is a different matter.

(e) Acknowledgments or covenants for production and undertakings for safe custody required by the purchaser are to be furnished or made at his expense, except that the vendor must bear the expense of—

(i) Perusal on his behalf and on behalf of other necessary parties except the purchaser;

(ii) Execution by himself and other necessary parties except the purchaser.

(L. P. Act, s. 45 (8).)

(f) A vendor is entitled to retain documents of title where—

(i) He retains any part of the land to which the documents relate; or

(ii) The document consists of a trust instrument or other instrument creating a trust which is still subsisting or an instrument relating to the appointment or discharge of a trustee of a subsisting trust.

(L. P. Act, 1925, s. 45 (9).)

Section 2 of the Vendor and Purchaser Act, 1874, contained a provision that where the vendor retained any part of an *estate* to which any documents of title related he should be entitled to retain such documents. It was held in *Re Williams and Duchess of Newcastle*, [1897] 2 Ch. 144, that "estate" meant an estate in land, and accordingly where a policy of insurance or other personal property (except chattels real) was included in the document the vendor could not retain the document on that ground alone. In such cases a special condition will still be necessary if the vendor wishes to retain the document after completion. If, however, documents are abstracted to show title to and extinguishment of an easement formerly benefiting the property sold, the vendor

may retain those documents where the formerly servient tenement is retained by the vendor: *Re Lehmann & Walker's Contract*, [1906] 2 Ch. 640.

Formerly, a purchaser could not require an acknowledgment for production of probates or letters of administration, but it has now been decided that, having regard to section 36 of the Administration of Estates Act, 1925, which provides for the endorsement on such documents of assents, a purchaser may require such acknowledgment: *Re Miller & Pickersgill's Contract*, [1931] 1 Ch. 511. It would seem on the authority of old decisions that in the absence of express stipulation, and subject to statutory provisions relating to particular cases, a purchaser may require a vendor to supply at the purchaser's expense attested copies of all documents of title properly retained by the vendor: *Boughton* v. *Jewell* (1808), 15 Ves. 176; *Berry* v. *Young* (1788), 2 Esp. 641. The vendor must in the absence of express stipulation bear the expense of obtaining and handing over on completion all deeds to which the purchaser is entitled on completion, even if such deeds are not mentioned in the abstract: *Re Duthy & Jesson's Contract*, [1898] 1 Ch. 419.

Condition 30 (1).

This paragraph deals with cases of sales in lots. Where the document affects two or more lots but no other property then, if all the lots which it affects are sold at the auction or within a month thereafter, the purchaser whose purchase-money is largest will receive the deed, or in case of equality, "such one of the purchasers as the vendor shall think fit" will receive it. Thus property is sold in lots 1, 2, 3, all of such lots being affected by the deed in question: A pays £200 for lot 1, B pays £3,000 for lot 2, and C pays £3,000 for lot 3. It might be argued that the vendor can hand over the deed to A if he thinks fit. It is submitted that the wording of this part of the paragraph may require recasting so as to make it clear that the vendor's choice must, in such a case, lie between B and C. It is suggested that the wording might run "or in case of equality between two or more purchasers, to such one of those purchasers as the vendor shall think fit". In order to give effect to the intention of this paragraph it is provided that the deed will be retained until completion of the purchase of all the lots affected by it. The vendor, if holding the deed, must give to the purchaser, or, if not, must obtain for him from the person holding the deed, an acknowledgment of his right to production and delivery of copies, and also an undertaking for safe custody unless the vendor or other person holding the deed is in a fiduciary position.

It has been laid down in relation to sales by lot that in the absence of any special condition—

(a) The purchaser of the largest lot in value is entitled to the title deeds relating to all the property sold (provided that such deeds do not relate also to other land retained by the vendor): *Griffiths* v. *Hatchard* (1854), 23 L. J. Ch. 957; 1 K. & J. 17.

(b) "Largest lot" means largest in area: *ibid.*

(c) If the conditions provide that the title deeds are to be handed to the purchaser of the "largest lot", and one person buys the largest individual lot and another buys several lots which in aggregate value and extent exceed the largest individual lot, the purchaser of the largest individual lot will be entitled to the title deeds: *Scott* v. *Jackman* (1855), 21 Beav. 110.

As between purchasers of individual lots, purchase price and not area is the test as to custody of title deeds (in the absence of express stipulation). It is thought to be the better opinion that a purchaser of several lots paying in all more than the price of any single lot would be entitled to the deeds, but there appears to be no authority upon this point. The importance of covering the possibility that all the lots may not be sold is illustrated by the Irish case of *Re Doherty* (1884), 15 L. R. Ir. 247, where it had been provided that the purchaser of the largest lot in amount was to receive the title deeds but all the lots were not sold. Although the vendor claimed that he was entitled under the statutory provision to retain the deeds by virtue of his ownership of the unsold lots it was held that he could not do so, but must carry out his undertaking to hand the documents to the purchaser of the largest lot.

Reference to Condition 30 (1) will show how carefully that paragraph has been drawn to cover suitably the points above mentioned. It is convenient to mention here that on a sale of property in lots a purchaser of two or more lots held wholly or partly under the same title has no right to more than one abstract of the common title except at his own expense: L. P. Act, 1925, s. 45 (5).

Condition 30 (2).

This paragraph follows the general rule that a mortgagee trustee or other person in a fiduciary position cannot normally be required to give an undertaking for safe custody in addition to an acknowledgment of the purchaser's right to production and delivery of copies: *Re Agg-Gardner*, 25 Ch. D. 600. Where a mortgagor can

be required by the terms of the contract to concur in the conveyance, however, this paragraph enables the purchaser to require him (unless he is in a fiduciary position) to covenant that when the document comes into his possession he will give an undertaking for its safe custody. It is clear from the preceding words that this provision is confined to cases where mortgagees or fiduciary owners actually have the custody of the document in question and the mortgagor is by the terms of the contract to concur in the conveyance. It will be seen that the mortgagor is not required to give an acknowledgment, the point being that the mortgagee or fiduciary owner has actual possession and is the person required to give the acknowledgment, which will run with and bind the mortgagor when the document comes into his possession. It is not quite clear to the writer that this condition will necessarily be satisfactory unless the mortgagor is a party to the contract. If he is not a party but has merely voluntarily agreed to join in the conveyance, it does not appear to follow that the vendor will be able to compel him to covenant to give an undertaking for safe custody as mentioned in this condition. However, the most frequent case of this type no doubt arises where the mortgagor *is* the vendor. It is suggested that a purchaser may reasonably ask that the mortgagor-vendor should also covenant that until the document shall have come into his possession and he shall have given such undertaking as aforesaid, the persons from time to time having possession or control of the document shall keep the same safe, whole, uncancelled and undefaced, unless prevented from so doing by fire or other inevitable accident. This is the liability of each individual possessor who gives a statutory undertaking for safe custody, save that the liability in such cases subsists so long only as he has possession or control of the document: L. P. Act, 1925, s. 64 (9). It will be seen that the suggested covenant by the mortgagor places him under a liability for the default of others until the document comes into his possession; but it seems that a vendor-mortgagor must either agree to give such a covenant or to give an *absolute* covenant (not the statutory undertaking) for safe custody: *Re Pursell & Deakin*, [1893] W. N. 152; Davidson, Conv. Prec., Vol. II, 318, 321 (notes) (4th ed.).

As the provisions of section 64 (9) of the L. P. Act, 1925, only apply "where a person retains possession of documents", an undertaking for safe custody given by a person not in possession of documents will not take effect under that sub-section at all, but as due effect must nevertheless be given to the undertaking it will operate according to its tenor. Accordingly the party giving an undertaking in such circumstances will be liable in damages not-

withstanding that the documents are destroyed by fire or other inevitable accident.

A mortgagee joining in a sale and acknowledging receipt of part of the mortgage moneys does not appear to be under any liability to give an acknowledgment in respect of deeds held and retained by them. The concurrence of the mortgagee in such cases being purely voluntary (in the absence of any provision in the mortgage), the mortgagee can presumably refuse to execute the conveyance except on such terms as he may think fit. Where the mortgagee refuses to give an acknowledgment the mortgagor must give a covenant for production : *Re Pursell & Deakin*, [1893] W. N. 153.

If, however, a mortgagee sells in exercise of his power of sale without special condition it would appear to be well settled in practice that an undertaking for safe custody cannot be required, although judicial authority to that effect appears to be lacking.

Condition 30 (3).

This paragraph should be read in conjunction with section 45 (4) of the L. P. Act, 1925, which provides as follows:—

"*On a sale of any property, the following expenses shall be borne by the purchaser where he requires them to be incurred for the purpose of verifying the abstract or any other purpose, that is to say—*

"(*a*) *the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the possession of the vendor or his mortgagee or trustee, and the expenses of all journeys incidental to such production or inspection; and*

"(*b*) *the expenses of searching for, procuring, making, verifying and producing all certificates, declarations, evidences, and information not in the possession of the vendor or his mortgagee or trustee, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament or other documents aforesaid, not in the possession of the vendor or his mortgagee or trustee;*

"*and where the vendor or his mortgagee or trustee retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser.*"

This statutory provision refers only to the *expenses* of producing, etc., such documents and supplying copies thereof. Condition 30 (1) goes further, and prevents the purchaser from insisting on the

production or even the handing over on completion of any document not in the possession or control of the vendor or his mortgagee or trustee. Apparently the vendor must at the purchaser's expense obtain such information as he can as to the whereabouts of such documents (in view of the concluding words of the condition); but he cannot be compelled to arrange for the production of such documents.

Section 45 (4) of the L. P. Act, 1925, follows the provisions of section 3 (6) of the Conveyancing Act, 1881, except that under the Act of 1881 the purchaser was compelled to pay the expenses of production of documents even if in the hands of the vendor's mortgagee or trustee. Under the Act of 1881, which threw on the purchaser the expense of production of all deeds not in the vendor's own possession, it was held that the purchaser must pay for the production of the title deeds, although they would have been in the vendor's possession but for the fact that they were held by his mortgagee: *Re Willett & Argenti* (1889), 60 L. T. 735. This rule has been changed by section 45 (4) of the L. P. Act, 1925.

It is also clear that the statutory provision does not absolve the vendor from the liability to furnish at his own expense a proper abstract of all documents material to the title even though such documents are not in his possession. This was established in the case of *Re Johnston & Tustin*, 30 Ch. D. 42, where the vendor sought unsuccessfully to throw upon the purchaser the expense of obtaining an abstract of the earlier title on the ground that he had only in his possession the conveyance to himself. It is also clear that under section 45 (4) of the L. P. Act, 1925, the vendor must, at the purchaser's expense, procure the production of the title deeds, if it is possible to do so. Condition 30 (3), however, carries the matter further. However important the document of title may be, the purchaser is prevented by this condition from objecting to the title on account of the fact that he has been unable to obtain production of that document in order to verify the title. However willing a purchaser may be, it is not unnatural that his solicitor will feel unable to recommend that the purchase be completed if the originals of all comparatively recent documents of title are not produced for inspection. Moreover, the purchaser may be relying upon a loan in order to complete the purchase, and it is extremely unlikely that the mortgagee's solicitor will advise his client to proceed with the purchase if the title deeds cannot be produced for inspection. In such a case the possibility is that the purchaser may be unable to complete his purchase. If he has paid a substantial deposit he may be unable to recover it and may also find that he is liable in respect of any loss resulting to the

vendor on a resale. It has been suggested, with reason, that it is doubtful whether such a matter should be covered by a general condition (Law Times, October 23, 1937). Admittedly, where the vendor knows that he will be unable to procure the production of some of the title deeds, it is not unreasonable that he should seek to protect himself by a special condition stating which of the deeds he may not, or will not, be able to produce. In such a case the purchaser can decide before contract whether he can safely accept the condition. As is pointed out in the article last mentioned, whilst such general conditions are in use (see, *e.g.*, to the like effect, National Conditions of Sale (13th ed.), No. 18 (3)), it is desirable to ask, in the course of general inquiries before contract, to what documents this condition will be applicable. Actually it may be better for the purchaser's solicitor to insert in the amendments to the special conditions a provision that this paragraph of the condition shall be deemed to be deleted, leaving it to the vendor to disclose the position fully if he desires to restore the paragraph for any special reason.

Quite apart from the possibility of an impasse owing to the deeds being untraceable, all practitioners have no doubt experienced many cases of serious delay whilst communications are passing backwards and forwards in the hope of tracing the present holder of material documents of title. It would therefore seem prudent, whatever conditions of sale are applicable, to endeavour to ascertain whether the custody of all title deeds is known with certainty, and, if not, to warn the intending purchaser of the possibility of substantial delay on that account. Clients seldom appreciate explanations of difficulties when they are given *after* the occurrence of those difficulties. The statutory provision above set out throws upon the purchaser the expense of production of every deed not in the possession of the vendor, his mortgagee or trustee, even though such deed forms the root of title: *Re Stuart and Olivant and Seadon's Contract*, [1896] 2 Ch. 328. On the other hand, it does not absolve the vendor from furnishing a proper abstract at his own expense, in accordance with the contract, of all documents constituting the title, even though the vendor has not possession of such documents (*Re Stamford, etc. Banking Co. and Knight*, [1900] 1 Ch. 287); or from obtaining at the like expense and handing over to the purchaser all deeds exclusively relating to the land sold: *Re Duthy & Jesson's Contract*, [1898] 1 Ch. 419. It was at one time considered that where a document was necessary to evidence the validity of the vendor's title the vendor was bound to procure it at his own expense. This view was founded upon the decision in *Re Moody & Yates* (1885), 30 Ch. D. 344, that a

vendor of leasehold property who has covenanted to build property to the satisfaction of the lessor's surveyor must procure and accordingly produce the surveyor's certificate of satisfaction. It would seem that the obligation of the vendor cannot be stated in such general terms. The true test is: Would the vendor's title necessarily be defective if the document did not exist? If so, the vendor must obtain it at his own expense. There are, however, documents which are requisite in order to preserve evidence that the vendor's title *is* good. Such documents do not make the title good, but are valuable by way of perpetuating evidence of the fact that the title *is* good. Thus, under the Courts (Emergency Powers) Act, 1914, the vendor's right to exercise his power of sale depended upon whether he had entered into possession of the mortgaged property: it was held that the expense of a statutory declaration in proof of this fact must be borne by the purchaser: *Re Wright & Thompson's Contract*, [1920] 1 Ch. 191. Once the vendor has stated that he had at the material date entered into possession he has discharged his obligation in this respect. Anything further which the purchaser requires in this connection is merely evidence not in the possession of the vendor, and must be paid for by the purchaser. It might, however, happen that a statutory declaration was required in order to make valid a document of title, *e.g.*, where a statute prescribes that a statutory declaration shall be made prior to the execution of a certain deed, such deed being invalid if the declaration is not made. In such a case (as in *Re Moody & Yates*, *supra*), the declaration must be shown to exist and must be abstracted, for without it the deed itself would be invalid, and, assuming that the deed is a material title deed, the vendor's title would be defective.

It was held, where mortgagees were selling in 1887, that the costs of certain statutory declarations required in order to provide evidence of the subsistence of the mortgage, which had been created in 1818, would be payable in the ordinary course by the purchaser requiring such declarations, having regard to section 3 (6) of the Conveyancing Act, 1881 (now section 45 (4) of the L. P. Act, 1925); but as the vendors had not offered to furnish such declarations at the purchaser's expense, but had taken out a vendor and purchaser summons asking for a declaration that a good title had been shown, the Court thought proper to order that no costs of the summons be awarded to either party but that the vendor's expenses of furnishing the necessary evidence of payment of interest under the mortgage were to be considered as part of the vendor's costs of the summons, so that the vendor was left to meet these expenses in the special circumstances of the case: *Re Edwards and*

Rudkin to Green (1888), 58 L. T. 789. The moral appears to be that where the title is good only if certain other parties concur or upon evidence being furnished of material facts, the vendor, if unwilling to obtain such concurrence, should at least offer, at the purchaser's expense, to obtain and furnish the requisite evidence, and should not maintain that his title is good without admitting the necessity of such evidence.

(*To be continued.*)

NATIONALISATION OF THE LAND LAW; OR THE COAL ACT, 1938.

The Coal Act is the most revolutionary statute in the Land Law since the Statute of Quia Emptores, passed in the year 1290. The changes effected by the Property Acts of 1925 seem of minor importance compared with the new principle of this Act. Yet its passage seems to have been almost unheralded and unsung.

We are not in this periodical concerned with politics, and passing references to the nationalisation of coal royalties should leave us unmoved. The Coal Act is much more than this. With regard to those strata of England, which are "bituminous coal, cannel coal and anthracite" and also "mines of coal" (section 3 (4)), the Act completes the operation of the statute of Quia Emptores, which eliminated in time most of the mesne lords, by eliminating the private lord altogether and vesting these strata in the Coal Commission (section 3). By a peculiar irony one "retained interest", that is, an interest not vesting in the Coal Commission, is the right of the owner of land formerly copyhold where the minerals can only be worked with the licence of the lord. In truth the copyhold is a hardy plant in English Land Law.

The Act is in fact a statutory conveyance of part of England to the Coal Commission, a body corporate with a common seal and a licence to hold land without a licence in mortmain (section 1) appointed by the Board of Trade. It is emphasised that it is a statutory conveyance, which it is believed is itself a novelty (*a*). It is not a question of compulsory powers of acquisition, but itself operates to transfer the ownership. Herein lies its revolutionary character even more than that it is concerned with the whole body of the country. It does not affect only those practitioners who have been concerned with mining rights but all conveyancers. It will involve fresh requisitions on all titles and special clauses in many contracts.

The general effect, therefore, of the Act can be regarded, primarily, as falling under two heads. There is the control by a public body of all coal mining together with the inevitable pro-

(*a*) Technically, it is believed that this is not quite accurate because the Petroleum Act, 1934, vested in the Crown mineral oil or relative hydrocarbons and natural gas existing in its natural strata, but it is thought that the interests concerned were not extensive.

visions for compensation of existing owners. Secondly, there is the conveyance of a stratum of England, or rather, perhaps, strata of parts of England, together with the creation or transfer of servitudes over land which is not transferred. It is natural that up to the present time attention has been concentrated on the former of these aspects. Here much comment has been made concerning "nationalisation" of industry and public control, and the operation of a public body has been closely watched. The Act necessarily includes many provisions to enable the Coal Commission effectively to carry out its duties in acquiring those interests with which it will be concerned. So, for example, the Commission shall reduce the number of coal-mining undertakings where to do so would promote efficiency (section 47). The problem of obtaining and disclosing information is responsible for several sections; *e.g.*, sections 36, 48, 53. The method of valuation of compensation naturally takes a prominent place: see Schedule III. These and other matters represent a side of the Act which is essentially official and public law, and it is interesting and instructive that an excellent book on the Coal Act, 1938, and ancillary statutes, such as the Coal (Registration of Ownership) Act, 1937 (noted *ante*, Vol. 2, p. 91), Mines (Working Facilities and Support) Act, 1923, Coal Mines Act, 1930, and others, has been produced by the legal adviser and registrar to the Coal Commission (*b*). This work contains summaries of the Coal Act and the Coal (Registration of Ownership) Act which are lucid and comprehensive, together with full notes to the sections. Little as we like annotated Acts it must be admitted that there has hardly been time to produce a text-book on the subject, and the comprehensive summaries by way of introduction go a good way towards filling the gap. The book will be invaluable to those who are immediately concerned with negotiations with the Coal Commission concerning royalties and compensation. No doubt it will provide ample material relating to what may be described as the official view of the interpretation of the Act and to the course to be pursued. We should like, however, to enter a caveat against what we have observed as the growing habit of the profession to rely upon text-books emanating from those engaged in the Government Department concerned. The official view of interpretation and practice is not necessarily the best in the interests of the private client. His lawyer should, therefore, be fully informed of any other interpretation of relevant Acts in order that he may put forward, and if necessary insist upon, a view that

(*b*) The Coal Act, 1938, by F. A. Enever, M.C., M.A., LL.D., of Gray's Inn, Barrister-at-Law. London: Solicitors' Law Stationery Society. 1938. xl + 496 pp. Price, 37s. 6d. net.

may not be held by the Department concerned. This undoubtedly involves more labour but it is the client's due.

Before passing from the public law to the conveyancing side of this Act, which is peculiarly the province of this journal, attention may be drawn to one interesting point of Constitutional Law. Section 17 (2) provides that no right adverse to " any coal or mine of coal " may be acquired under the Real Property Limitation Acts or, unless the contrary is expressed, any Act passed in future amending, repealing or re-enacting them. This is an attempt to provide an interpretation of future Acts of Parliament which may have interesting results in view of the constitutional rule that Parliament cannot bind subsequent Parliaments. It may be convenient here to point out that the learned author of the work just mentioned has by a slip of the pen (p. 107) emphasised a point on this sub-section. He says that " no title to coal or a mine of coal that vests in the Commission . . . can be acquired by prescription ". Rights under the Real Property Limitation Acts are not prescriptive rights but rights acquired by adverse possession, and do not, of course, include those rights which can be acquired under the Prescription Act or prescription at Common Law. These prescriptive rights, including ways, support, etc., may be of great importance in working minerals, but apparently they have been completely disregarded by the Act. Of this we may have more to say.

Turning, then, to the Act as a conveyance of land we may note that it is a conveyance for a valuable consideration, which is £66,450,000. It is a conveyance in fee simple of all " coal and mines of coal together with such property and rights annexed thereto and such rights to withdraw support as are hereinafter mentioned, subject to such servitudes, restrictive covenants and other matters adversely affecting any of the said coal or mines as are hereinafter mentioned " (section 3 (1)). The conveyance takes effect on July 1, 1942, therein called the " vesting date ", but on January 1, 1939 (the " valuation date ") there shall be deemed to be a contract for valuable consideration. Presumably this contract does not require to be registered under the Land Charges Act, 1925 !

The distance in point of time between the " valuation date " and the " vesting date " renders necessary a number of transitional provisions which cover the effect of the " statutory contract " and the powers of disposition of the legal owner pending vesting in the Commission. The contract is deemed to be a contract for sale of all rights which would pass under the " statutory conveyance " (section 4). The value of the individual holding is fixed at the " valuation date ", but from the date of the passing of the Act

(July 31, 1938) the owner is deemed to be in a fiduciary capacity and therefore under an obligation to refrain from any transaction calculated to give a "fictitious or artificial value" to the value of the holding or to the prejudice of the interests or powers to be acquired under the Act (section 18). Presumably the effect of this section is not only to fix the value very largely as at the date of the passing of the Act, subject to any further removal of coal under existing leases, but also to render the owner liable in equity for any loss of value of the holding caused by a transaction to the prejudice of the Coal Commission. In view of the limitation of the right to withdrawal of support of the surface to be mentioned hereafter, a nice question may arise by sale of the site for building purposes which may therefore increase the liability for support. The section will require interpretation.

The statutory contract is to be subject to the rules of law and equity governing the obligations of a contract subject to certain conditions (section 8). These modifications roughly are as follows:—

First, such as are requisite by virtue of the fact that the premises vest by the Act in lieu of being conveyed. This may give rise to difficulty. The Act seems uncertain whether it is vesting or a conveyance, since in Schedule II (1) it is said that the conveyance assumed by section 4 "shall be a conveyance". An Act of Parliament can do anything, but it remains to be seen how it can do two apparently inconsistent things at once.

Secondly, the obligation of care imposed upon mineral owners is to be that exercised "under the ordinary practice of the management of mineral estates by prudent owners in relation to property that is to continue in their ownership".

Thirdly, the owner is to be treated as if the contract had provided that the vendor should be entitled to possession and enjoyment until the date fixed for completion and to the benefit of the rents and profits accruing up to that date, even where a mine is opened after the date of the contract.

Where a new lease or variation or renewal of an existing lease is to be made during the interim period, a draft of such instrument is to be delivered at least two months prior to execution to the Coal Commission (section 9 (1)). Failure to do this renders the lease void so far as regards the title to vest in the Commission (section 9 (4)). Within two months the Commission can apply to the Court for a declaration that the lease is not in accordance with the obligations imposed by the contract, and so presumably is invalid. A more difficult provision is the analogous one that where any other disposition of *or affecting* any of the premises to be

vested in the Commission is proposed, notice in writing *may* be given to the Commission (section 9 (2)). The provision is permissive apparently because it is difficult to see how any disposition of the surface could not affect the coal, and it is obvious that in some circumstances the coal owner may be unaware of its existence. Apart from the ignorant owner, who may yet present a serious problem, it would probably be too much to require notice of any disposition of the surface. The advantage of giving notice is that in such cases, unless the Commission take action, no question can arise concerning the obligations imposed by the statutory contract. It is suggested, therefore, that where the purposes of conveyance are inconsistent with the mining rights, or where restrictions are imposed that may impede their exercise, it will be desirable to give notice to the Commission at least in all those cases where coal *may* be found under the land. It may, perhaps, be emphasised here that the coal which vests is not only the coal known to exist but any coal wherever it may be. The story of the recent crisis that in digging a trench for A.R.P. purposes a man found and dug out two tons of coal gives point to the observations just made. Clearly under the contract he would be entitled to do this unless he had received value in the form of a fixed valuation. After the "vesting date" he would be liable for trespass and, presumably, after severance of the coal, for conversion too. The more important aspect of this unknown strata that may vest in the Commission is the existence of rights to enable the Commission to get it worked. This will be examined in connection with the conveyance. It is convenient here to point out that presumably on preliminary inquiries, or requisitions on title, it will now be necessary to inquire (a) whether there are any rights under the Coal Act to which the land sold is subject; and (b) whether there is any coal within the Coal Act under the land sold.

The Act (section 41) provides that as regards the premises comprised in the Act of land registered under the Land Registration Act, 1925, the Act shall have effect as if they had not been registered, and all rights and titles conferred on the Commission are overriding interests with the Land Registration Act. This adds to the number of overriding interests contained in section 70 of the Land Registration Act, and any transfer of registered land is subject to all overriding interests whether or not they are noted on the Register (L. R. Act, ss. 20, 23). Previously to this Act any severance of mines and minerals could only be effected by a registered transfer, since an interest in such mines and minerals was a registrable interest within the Act. The servitudes, such as ways, created by the Act being in the nature of easements, etc., would

in any event have been overriding interests and as such binding upon transferees without notice. Where it is known that the land has coal under the surface it is desirable to disclose this in the contract for sale, though the exact position in registered land is uncertain.

The Act does not apply to those interests held on lease for the purpose actually of working the coal. It is clear that it is not the purpose of the Commission to work the coal but to control the working of the coal and the amount to be paid for this privilege. So, the estate of a lessee who has granted a sub-lease to a person working the coal passes to the Commission (section 5). A lease for working coal, which in fact is exercised, is a " retained interest ", as is the interest of the tenant of quondam copyhold previously mentioned, and so also a right to work coal by a working facilities order. These " retained interests " naturally give rise to a number of provisions regarding rent, etc., and even the reduction of coal-working undertakings, but these matters are too specialised for further reference.

Regarded as a conveyance of these strata by the statute, it is thought that many interesting questions will arise. The essential provision is as follows: " There shall vest in the Commission with any coal or mine of coal—(a) all property and rights, other than rights to withdraw support or rights created by working facilities orders, that would pass with that coal or mine under a conveyance thereof such as is specified in Part I of the Second Schedule . . . ; and (b) such right, if any, to withdraw support as is under the provisions of Part II of the Second Schedule . . . " (section 4 (3)). This must be read in relation to section 15 with regard to underground land not vested in the Commission, which provides that the Commission shall have the right and shall have power to grant a licence to any person to do any of the following acts in the course of operations carried on for a coal-mining purpose, that is to say, " to enter upon, remove, execute works in, pass through and occupy any such land and to do all such other acts in relation to any such land as are requisite or convenient for the purposes of any such operations ", except (a) to interfere with underground operations for other than a coal-mining purpose; (b) to interfere with the surface of any land; (c) to withdraw support; (d) to do any act which would otherwise be actionable by virtue of any servitude, restrictive covenant, or statutory prohibition or restriction; (e) to do any act which would be actionable as trespass or nuisance and which *would be likely* to cause actual damage other than nominal damage.

Stopping here for a moment it would seem that section 15

operates to create something in the nature of a statutory easement in relation to underground land. So, for example, if a seam of coal has been half worked out the Commission will have vested in it, of course, the remnant of the seam and a right to use the underground workings subject to the restrictions mentioned. Apart from this section, presumably it would be a trespass to enter upon the underground workings, but this appears to be the essential problem of the Act. The Act vests " mines of coal " as well as coal, and a " mine of coal " is defined as " a space which is occupied by coal or which has been excavated underground for a coal-mining purpose and includes a shaft and an adit made for a coal-mining purpose " (section 44 (1)). Consequently the example given may not be what is contemplated by the Act, even though the underground workings may have been long abandoned and the mine ceased from working. If this is so, then apparently all derelict workings and mineshafts will vest in the Commission, and they may find themselves liable to some interesting claims for damage due to subsidence, etc. What amount of user would constitute actual as distinct from nominal damage is also a matter of some interest. For example, would the removal of land, not being a coal stratum, be regarded as actual damage? Such a removal might clearly be desirable for the purpose of enlarging existing workings. Emphasis may be laid upon the restriction of rights over the surface. It is clear that a very necessary ancillary to the whole of this scheme is the Mines (Working Facilities and Support) Act, 1923, as amended by the Coal Act, by which compulsory powers are conferred to enable mines to be worked, and the basis of compensation is that of a " willing grantor " and a " willing grantee " (section 9). The inclusion of this and subsidiary Acts with notes in the work of Dr. Enever on the Coal Act greatly enhances the value of that work. The nature of the rights conferred by the Act of 1923 does not appear to have been determined, but a purchaser of the surface would, it is thought, be entitled to have such rights, if any, disclosed to him. In the absence of disclosure and assuming that they were not apparent some difficulty might arise in connection with the transaction, since it might be argued that the rights were in the nature of a licence not binding upon a purchaser.

Turning to the conveyance assumed by the Second Schedule, we find that it shall be " a conveyance to which all persons having any interest other than a retained interest in that coal or mine are conveying parties, to a purchaser for money or money's worth with notice of all matters whereof notice is material ". The effect, therefore, is that the conveyance is bound by all equities not

requiring to be registered under the Land Charges Act and all matters registered under the Land Charges Act which a vendor for value could not overreach. So, for example, the Commission will presumably be bound to see to the due discharge of all mortgages, but they will not be concerned with equities under a settlement under the Settled Land Act (see Third Schedule, para. 18). Where the land is subject to restrictive covenants, as, for instance, to use only for the purpose of the erection of private dwelling-houses, any development of mineral wealth will be subject to these restrictions, subject, of course, to any powers that can be acquired independently of the Act. On the other hand, to impose such restrictions at the present time when the surface owner was aware of the existence of coal under the land might be a breach of the fiduciary obligation imposed by the Act. Such a transaction is obviously one where notice should be given to the Commission as previously mentioned. Whether a conveyance known to be for the purpose of building falls within the same character is perhaps a more difficult question. The existence of buildings gives rise to the problem of subjacent support (see *Warwickshire Coal Co.* v. *Coventry Corpn.*, [1934] 1 Ch. 488), and it remains to be seen whether the contract to convey the minerals operative on January 1, 1939, affects that right.

Where the conveying party has also a retained interest, such as a lease to work mines, he is deemed not to be a conveying party of that interest (para. 2 (1)).

Where the conveying party is a surface owner the conveyance will not operate to grant any adverse servitude over the surface, either by virtue of section 62 of the Law of Property Act, 1925, or of any rule of law relating to the grant of servitudes as servitudes of necessity, any further than it would have done had none of the conveying parties had any interest in the land (para. 2 (2)). This exclusion is of principal importance. Where a lease exists and servitudes are annexed to them it would appear that on a grant of the fee simple the servitudes are granted in fee simple, and, indeed, under section 62 rights enjoyed simply by permission would be turned into legal easements (*International Tea Stores* v. *Hobbs*, [1903] 2 Ch. 165). Section 62 has even been held to apply to rights in the nature of a *profit à prendre* (*White* v. *Williams*, [1922] 1 K. B. 727), though it does not affect rights of a temporary character incapable of subsisting as a legal easement (*Burrows* v. *Lang*, [1901] 2 Ch. 502; *Bartlett* v. *Tottenham*, [1932] 1 Ch. 114). It would seem, therefore, that even where a lease is not a "retained interest" by virtue of a sub-lease for working minerals, no rights in fee simple at least would be created by the statutory conveyance. Any rights over the surface or subsoil that is not comprised in the

definition of " coal and coal mine " will not pass under the conveyance, and it will be left to the Commission to acquire such rights as may be necessary to their purpose by independent methods. It is true that after the " vesting date " no person other than one authorised by the Commission has the right " to search or bore " for coal, but it is thought that the Act nowhere confers upon the Commission the right so to search or bore, since either of these operations involve normally an interference with property not vested in the Commission. Those more familiar with mining operations may be able more adequately to see how the provisions of this conveyance can operate, since an " adit " is believed rarely to exist immediately beside a highway, and access does not seem to arise even under the Common Law rules of " way of necessity " (see Norton, Deeds, pp. 287—289), which is expressly excluded by the Act (*c*). Presumably the method of obtaining the necessary surface rights will depend upon negotiation, and in the last resort a compulsory order under the Mines (Working Facilities) Act, followed by arbitration. Where a lease is already in existence no problem will arise until the determination of the lease, but where a lease is to be granted difficulties seem inherent, since the Coal Commission can only grant the lease while the surface owner must grant the facilities, and considerable care will require to be exercised to ensure that problems do not arise out of the distinction between easements and licences. The difficulty may be overcome to some extent by the provision that the Commission is competent to acquire any right to be exercised for the benefit of coal mining (section 32).

Where there is any restrictive covenant affecting the coal or mine in which the conveying party would remain liable there is an implied covenant of indemnity in respect of breach by the Commission in the usual form (para. 2 (4) of Schedule II). It will be noticed that this provision applies only to restrictive and not to positive covenants, such, for example, as a liability to fence and maintain a fence. This is due, no doubt, to the fact that such covenants do not run, so far as burden is concerned, with the land either at law or in equity, but the personal liability is not excluded by a transfer, statutory or otherwise, and usually such a covenant does remain enforceable over a period of time by reason of this personal liability coupled with indemnity covenants by transferees.

(*c*) Sched. II, para. 2 (2) : this may not exclude the wider class of easements conferred on a grantor of minerals under the rule in *Wheeldon* v. *Burrows*, 12 Ch. D. 31 (see Bowen, Coal Act, 1938, p. 196), because " servitudes of necessity " are sometimes confined only to those servitudes reserved to a grantor. The term is used, however, somewhat loosely even in the language of judgments, and it is thought that here it must be construed to include all those rights which would be conferred by the above-mentioned rule.

Whether this peculiarity of the provisions will result in hardship remains to be seen.

Finally, para. 3 of this part of the Schedule provides that the transfer operates irrespective of the capacity to convey or the requirement of consent. This, of course, eliminates all such problems as would otherwise arise in connection with charity lands, or the limitation of powers of such bodies as local authorities.

The statutory conveyance also includes an implied statutory acknowledgment of any documents relating to the title to, or to the management of, coal or a mine of coal (section 14 (3)).

Part 2 of the Second Schedule deals with the right to withdraw support. These provisions fall under two heads. First, where the coal was severed in fee simple or under a lease. Here the right to withdraw support is limited to that vested in the owner of the severed coal at the "valuation date", except that where the severance was by lease the right exists for the whole time for which the coal remains ungotten and not merely the term of the lease. This provision is of importance, as was shown in *Warwickshire Coal Co.* v. *Coventry Corpn.* (*supra*), where it was held that on severance no right to withdraw support was granted, and so there was liability for any subsidence. In the case of coal under land not now being worked this may play an important part in view of the large measure of severance, as, for instance, where land was formerly copyhold.

Where the coal has not been severed the right to withdraw support is more extensive. Here it is coincident with the extent to which the *existing owners* were competent at the "valuation date" to grant such a right "so far as may be reasonably requisite for the working of any coal". The right is, however, limited by the liability either to pay proper compensation or with the consent not to be unreasonably withheld of the person entitled to compensation to make good the damage. It may not be clear to some what compensation could be "proper" for a subsidence involving serious, and perhaps irreparable, damage to a family mansion occupied by the owner's family through many generations, but interference on a large scale with private property must probably involve such "minor" difficulties. Where the Commission propose to exercise their right to withdraw support they must give notice in the Gazette and in one or more of the newspapers circulating locally. The effect of such a notice is to operate as a restriction upon the surface owner's right to erect any further buildings upon his land without first notifying the Commission of his intention to build and, if requested, submitting plans. The Commission may then propose modifications with respect to foundations, and even

inspect the foundations so laid, but extra expense involved, if reasonable, shall be met by the Commission. It becomes apparent that this operates as in the nature of a restrictive covenant and a purchaser should inquire. Whether failure to disclose would be a ground for rescinding the contract will remain to be decided. The question can only arise after the "vesting date", so that it will not be material for a considerable time. Nor does the relation between this right to withdraw support and any covenants restrictive of the user of land appear to have been considered. On the surface it would appear that it can only be exercised in the absence of any restrictions preventing the user of the land for other than certain purposes, but again the possibility of obtaining protection by imposing the restrictions now seems to be gone by reason of the fiduciary position of the surface owner imposed by the Act. This provision is probably the greatest invasion of the private rights of owners made by the Act. Where an owner is unfortunate enough to have unworked coal under his land, of which he may at the present day be ignorant, it would appear that he may have his surface severely impaired, whatever his views, and be left simply to a right to compensation. Such an owner may be in a worse position than one whose surface has been severed from the coal by some obscure statute, as in *Warwickshire Coal Co.* v. *Coventry Corpn.* (*supra*), or by the law, as is usually the case where the land was formerly copyhold.

On the other hand there must arise the question of prescriptive rights over the surface and in respect of adjacent land which may now be in the course of being acquired, or may be acquired by user subsequently to the passing of the Act. It is thought that these rights can be a considerable embarrassment to the rights to work minerals. Nothing in the Act appears to affect the acquisition of these rights and it will be borne in mind that there is a present tendency considerably to extend the scope of easements. This must remain a problem that awaits solution.

It is not the purpose of this short article to exhaust the provisions of this revolutionary Act, neither is it intended either to praise or to blame it. Shortly it was to put the practitioner on notice of the far-reaching character of its provisions.

It is a transfer of coal and coal mines, but what ancillary rights, apart from the right to withdraw support, pass under the transfer seem to the writer to be far from clear. A coal mine can usually be worked only from the surface and requires a fairly extensive surface for its use. What are the rights and liabilities of the Commission over such surface, if acquired, seem to vary according to the circumstances.

The most important matter, however, for practitioners generally appears to be the position of surface owners who have not contemplated coal mines and do not wish to do so. If there is coal under their land and the Commission wish to work it the owner seems to be powerless to stop it. Purchasers of land must, therefore, be put on notice of the possibility where this can be done. This will involve the careful consideration of those responsible for drafting contracts and may involve some necessary changes in certain conveyances to render the land subject to these rights and so avoid questions on covenants for title.

[*Note.*—Since this article was written we have received for review The Coal Act, 1938, by David Bowen, K.C., published by Hamish Hamilton (Law Books), Ltd. xlvii + 492 pp. Price 42s. net. This work also includes the Associated Statutes, Rules and Forms, such as the Coal Registration Act and the Mines (Working Facilities) Act, 1923. Like Dr. Enever's work mentioned above it is an annotated Act, but contains no summaries. This is certainly a drawback to anyone coming fresh to the study of the subject. On the other hand the annotations of the Coal Act are much more extensive and they incorporate on the property side of the Act a considerable amount of material with authorities. To those concerned with the effect of this statutory conveyance, including an analysis of those entitled to compensation, we recommend this book as, at least, an excellent starting point for the law on the subject.]

NOTES OF CASES.

1. *CONVEYANCING AND REAL PROPERTY CASES.*

Settled Land Act, s. 75 (5)—investment of proceeds of sale—personalty.—Re Cartwright (*ante*, p. 82) has been reversed on appeal, [1938] 4 All E. R. 210. Bennett, J., held that the proceeds of sale of realty under a settlement for the purposes of the Settled Land Act were personalty for the purposes of Lord Kingsdown's Act, 1861, and passed under a will executed in accordance with that act. The Court of Appeal unanimously overruled this decision. The facts do not require much elaboration. It was a case where a person, entitled, under settlement, to a fee simple subject to certain outstanding limitations, had executed his will according to French law, revoking an earlier English will. The question was whether the will dealt with the proceeds of sale in the hands of the trustees of land held under the settlement. The Court of Appeal held that the will did not affect the proceeds of sale because they retained the character of realty and so were not within the Wills Act, 1861.

The judgment of the Court was delivered by Sir Wilfrid Greene, M.R., and deserves close attention since it is an analysis of the whole position. The first argument dealt with was that section 75 (5) of the Settled Land Act, which directs that proceeds of sale shall be treated as land, did not operate to convert the proceeds of sale to real estate. One point made was that "land" includes leasehold. The Master of the Rolls held that the word "land" must be construed (at p. 215): "where you are dealing with a settled freehold estate which is sold, the capital money would be treated as freehold, and, where you have a settled leasehold which is sold, the capital money would be treated as leasehold, and so forth". It will be recalled that the definition of land in the Settled Land Act includes land of any tenure, various incorporeal hereditaments, and any estate or interest in land. This construction of section 75 (5) eliminates any question which might affect interests created by the trust instrument in the settled land such as rentcharges, that might otherwise be converted into personal annuities.

The second argument was that the Act did not affect the nature of the capital money and its devolution for any purpose outside the settlement. The learned Master of the Rolls dismissed this

argument on the ground that the proceeds of sale remained in settlement and were, *a fortiori*, freehold land. Here the warning appears that had the settlement come to an end another view might be possible, and it may be desirable to add a comment on this. Practitioners are familiar with the decision in *Re Bridgett & Hayes' Contract*, [1928] Ch. 163. It is not at all improbable that the settled land would be sold during the life tenancy and the question may well arise whether it passes to the person next entitled as personalty and not as realty, apart, of course, from the additional question whether such person takes the proceeds in their converted form. For example, if the person dies in the lifetime of the tenant for life, do the proceeds pass to the persons entitled to his personalty? It might be assumed that on the death of the remainderman the interest in remainder being realty it could not pass as personalty, but this does not appear to be the end of the problem.

The third argument was based more particularly on the facts of the case. The argument was that the deceased was indefeasibly entitled in fee simple, subject to annuities, and that he had by his conduct and in his will shown an intention to elect for conversion. This argument was based on two counts. The first was unsound because there were other persons entitled under the settlement: and the Master of the Rolls cited with approval *Re Sturt*, [1922] 1 Ch. 416. The second was that if he was entitled on a contingency he could elect to convert prior to the contingency on the assumption that that would happen: see Jarman, Wills, 7th ed. p. 745. This was ruled out, because the evidence of intent to convert was in the will and this was held not to be available under Lord Kingsdown's Act.

The last head was the point taken by Bennett, J., in the Court of first instance. The learned judge had held that the alteration in the law of intestate succession made it necessary to treat the distinction between real and personal estate for this purpose as extinct. This view was unacceptable because the Administration of Estates Act had not abolished the distinction but only provided that a different class of persons should benefit on intestacy. It was not pointed out that so far as intestate succession itself is concerned the Act provided for conversion of all beneficial interests by section 33 (1) so that in fact there appears to be no intestate devolution of real estate. This, however, only supports the proposition that the Act made no general change in the distinction between real and personal property. This fact might be borne in mind more frequently than it is when confronted with the choice between the method of strict settlement and trust for sale in

settling substantial real estate. The judicial warning that the distinction has only been affected in one, though a vital, particular is valuable.

Settled Land—additional powers—conveyance before vesting deed.—Re Jefferys, [1938] 4 All E. R. 120, is a short case worthy of careful attention. A testator, who died in 1912, left by his will his residue upon trust to pay an annuity to X during his life and subject thereto to accumulate the income and on X's death to pay the residue to certain charities. The will contained a power of sale in the trustees with the consent of X. In 1933, by virtue of the Accumulations Act, 1900, the direction to accumulate became invalid. This raised certain points concerning the destination of income, including income from certain sales made after 1925. No vesting deed had been executed. Farwell, J., held that (i) the trustees were statutory owners under the Settled Land Act; (ii) the power of sale was not an additional power that could be included in any vesting deed; (iii) the income was payable to the heir at law of the testator because any sale made after 1925 could only be made under the Settled Land Act and not by virtue of the power of sale and consequently was capital money for the purpose of the settlement. The learned Judge also expressed in passing the view that, in the absence of a vesting declaration, the only effect of the conveyances made after 1925 in purported pursuance of the power of sale was to create contracts to sell by the statutory owners in that capacity under section 13 of the Settled Land Act. The last point was not, apparently, seriously discussed and the position was rendered easier by virtue of the position of the trustees as statutory owners in whom the legal estate had automatically vested by virtue of the transitional provisions.

The real difficulty of the case lay in the question whether the power of sale was an additional power under section 108 of the Settled Land Act, which provides : " Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exercisable by a tenant for life, or (save as hereinafter provided) by trustees with his consent, or on his request, or by his direction, *or otherwise* ". Clearly the power was not exercisable by the trustees by the consent, etc., of the tenant for life because there was no tenant for life. The question, therefore, was the effect of the words, " or otherwise ". The learned Judge said (at p. 125) : " Do the words ' or otherwise ' apply to a power exercisable by the trustees with the consent of the tenant for life whether the sale is to be with the consent, or by the request of, or at the

direction of, the tenant for life, or by some other method, some act to be done by the tenant for life, or do the words mean in general any power which is given to the trustees, to be exercised with the consent of other persons?" The learned Judge took the view that the words were to be construed in the limited sense and included only powers to be exercised with the consent of the tenant for life.

He also held that the power being a limited power of sale was in conflict with the provisions of the Act and so invalidated after 1925, and the only power of sale subsequently enjoyed was that under the Act itself as statutory owners.

This decision seems to have relevance outside its peculiar facts since it clearly may affect the destination of the proceeds of sale. It becomes clear, therefore, that only a very limited class of powers of sale vested in trustees before the Act became additional powers after 1925. It is also to be noted that the section does not only relate to powers of sale. One of the commonest forms of additional power in a settlement are those affecting investments. This power, if conferred upon trustees, is apparently only valid where it is exercisable with the consent, etc., of the tenant. Where there is no tenant for life because of the existence, for example, of a discretionary trust, it may become an acute question whether the power is exercisable. Of course, if the power is exercisable by the trustees as statutory owners in lieu of a tenant for life, and the power is expressed to be conferred upon the tenant for life, no difficulty exists. If, however, the form is differently expressed then, apparently, considerable care must be exercised in drafting an appropriate form.

Settlement of settlor's own property—protected life interest—discretionary trust over—capital paid by trustee to tenant for life in breach of trust—claim by trustees to retain income to make good the breach—subsequent bankruptcy of tenant for life—discretionary trust effective.—Where a breach of trust is committed by a trustee at the instigation of the tenant for life, in order to benefit the latter, both the trustee and the tenant for life are liable to the other beneficiaries, and the trustee is entitled to be indemnified by the tenant for life, because a beneficiary is not entitled to further moneys out of a trust fund until he has replaced the amount he has been overpaid. In *Re Balfour's Settlement, Public Trustee* v. *Official Receiver*, [1938] Ch. 928, these principles applied to breaches of trust under a settlement which had given the income to the tenant for life until he should "do or suffer something whereby the same or some part thereof would through his act

or default or by operation or process of law or otherwise if belonging absolutely to him become vested in or payable to some other person or persons", with a discretionary trust over.

The point at issue was whether the discretionary trust had come into operation when the trustees had asserted their right to retain the income, with the result that nothing passed to the trustee in the subsequent bankruptcy of the tenant for life. Farwell, J., held that nothing passed to the trustee in bankruptcy, because as soon as the trustees ceased to pay over the income to the tenant for life in assertion of their right to impound the income to make good the breach of trust, the life interest was forfeited and the discretionary trust took effect. *Re Brewer's Settlement*, [1896] 2 Ch. 503, in which the clause of cesser was not unlike that in the present case, was distinguished on the ground that there the trustees had not asserted their right before the date of the bankruptcy. In fact, the funds lost by the breach of trust were replaced as a result of proceedings taken by other beneficiaries, and the trustees' right of indemnity was not mentioned in argument or in the judgment as reported. Although the interest of the settlor was in both cases a determinable life interest, the mere payment of capital by the trustee to the life tenant did not cause a cesser of the interest, because according to Farwell, J., the trustee's right to indemnity is inchoate until it is asserted. Chitty, J., in *Re Brewer* (*supra*, at p. 507) suggests that if the settlement had contained a limitation over if the income should "cease to be payable" to the life tenant, the dissipation of the trust fund would have worked a forfeiture. The learned Judge had already said (at p. 506) that it appeared to him to be immaterial whether the loans of capital were breaches of trust or not, but this was not the view of Farwell, J., in *Re Balfour* (*supra*), where different circumstances caused the whole issue to turn upon the nature of the trustees' right.

The result of the two cases would appear to be as follows. If a trustee pays capital to a life tenant, the income on the sum so paid "ceases to be payable" to the latter, because he has the corpus. A life interest with a clause of cesser containing the words suggested by Chitty, J., is forfeited by dissipation of the trust fund in the manner described. A determinable interest with a clause of forfeiture such as that in *Re Balfour's Settlement* (*supra*) is not forfeited by the mere act of payment of capital to the life tenant in breach of trust, but it ceases if and when the trustees exercise their right of indemnity as in *Re Balfour* (*supra*), or, *semble*, apply for and obtain an order, under section 62 of the Trustee Act, 1925, impounding the income. As Chitty, J.,

said in *Re Brewer's Settlement* (*supra*, at p. 507) such an order could not be made effectually as it would work a cesser of the life interest, and the same result must follow from the action taken by the trustees in *Re Balfour* (*supra*). In fact, then, the trustees are unable to obtain indemnity, as the gift over after the cesser of the determinable life interest takes effect. This is an odd result to which the learned Judge in the case noted did not directly advert. M. E. B.

Power of appointment conferred by pre-1926 settlement—exercise after 1925—application of Trustee Act, 1925, s. 31.—A small point of some practical importance was decided by Crossman, J., in *Re Dickinson's Settlement, Bickersteth* v. *Dickinson* (1938), 82 S. J. 744; 186 L. T. 205; [1938] W. N. 311. He held that, where a special power of appointment contained in a marriage settlement executed in 1885 had been validly exercised by deed in 1932 in favour of infant grandchildren of the appointor, section 31 of the Trustee Act, 1925, applied to the income of the contingent shares of the appointees so as to enable the trustees (who were given no power of maintenance by the settlement) to apply such income for the maintenance of the appointees. The interests of the latter arose solely under the deed of appointment executed in 1932, and therefore not under an instrument executed before 1926, in which case section 31 would not apply (sub-section 5).

The decision would, it is submitted, have been the same if the power had been a general power conferred by a settlement coming into operation before 1926, and had been exercised after 1925. In *Farwell on Powers* (3rd edn., 1916) at pp. 328 and 576, it is said that estates created under a power are to be regarded as created by the instrument creating the power, but at pp. 310, 311, it is stated that the exercise of a power of appointment creates new estates. The latter statement was adopted as the true rule by Hamilton, J., in *Duke of Northumberland* v. *Inland Revenue Commissioners*, [1911] 2 K. B. 343, at p. 354, and Stirling, L.J., in *Att.-Gen.* v. *Earl of Selborne*, [1902] 1 K. B. 388, at p. 398, thought that there could be no question, as a general rule, that such was the effect of the exercise of a power : see also *Re Vizard's Trusts* (1866), L. R. 1 Ch. 588, and *Sweetapple* v. *Horlock* (1879), 11 Ch. D. 745. In *Re Dickinson's Settlement* (*supra*) Crossman, J., considered that the point before him was concluded by the decision of Russell, J. (as he then was) in *Re Rush, Warre* v. *Rush*, [1922] 1 Ch. 302, that where the beneficial interests of German nationals in English trust funds in default of appointment were charged under the Treaty of

Peace Order, 1919, the exercise of a power of appointment in their favour, after the date when the Treaty came into force, divested the estate limited in default of appointment and created a new estate which was not charged by the Order.

M. E. B.

Powers—life interest with full power to deal with property as if donee's own—gift over after life interest—general power of appointment exercisable inter vivos and by will.—Re Lawry, Andrew v. *Coad*, [1938] Ch. 318, raised a peculiar point of construction of a will of a testator who gave the residue of his property equally between his two sisters " for their respective lives with full power to deal therewith as if it were their own and on the death of either of them or in the event of either or both of them predeceasing me then I give and bequeath her or their shares " to X. One of the sisters of the testator died in his lifetime. It was argued for the administrator of the estate of the testator with his will annexed that the power which the testator had given to the surviving sister was merely an administrative power, and that even if it were a power of appointment it was exercisable only *inter vivos* and not also by will, as was contended on behalf of the respondent who was the executor of the will of the sister who had survived. Bennett, J., declining to construe the language of the will as conferring merely an administrative power, held that the beneficial power was one which gave the donee power to deal with the property in which the testator had given her a life interest, as if it were her own. A person who is empowered to deal with property as if it were his or her own can dispose of it *inter vivos* or by will. The persons entitled in default of exercise of a power have vested interests liable to defeasance in the event of a valid exercise of the power, and in the present case the vested interest in remainder was subject to the exercise of the power by the donee of the power by deed *inter vivos* or by will. In *Re Shuker's Estate, Bromley* v. *Reed*, [1937] 3 All E. R. 25, where a testator had given all his property to his wife (whom he appointed sole executor) for life with power to deal with the same and to convert to her own use such parts of the capital of the estate as she might think fit, with a gift over, Simonds, J., held that the widow had a general power of appointment which was exercised by her declaration that she had converted the whole of the estate to her own use. *Re Ryder, Burton* v. *Kearsley*, [1914] 1 Ch. 865, was very similar to the last case. The testatrix authorised her husband so long as he was entitled to the income of her estate (under a gift determinable on his death or remarriage)

to apply such portion of the *corpus* of her estate as he should think fit for his own use and benefit, and Warrington, J., held that the husband had a general power of appointment exercisable by deed.

Again, in *Re Richards, Uglow* v. *Richards*, [1902] 1 Ch. 76, a bequest of the income of an estate to the testator's wife for life with a direction that in case such income should not be sufficient she was to use such portion of the capital as she might deem expedient was held to give the wife a general power of appointment over the capital during her life: cf. *Re Pedrotti's Will* (1859), 27 Beav. 583. Bennett, J., in *Re Lawry* (*supra*) was able to distinguish *Re Thomson's Estate, Herring* v. *Barrow* (1879), 13 Ch. D. 144; (1880), 14 Ch. D. 263, where both Hall, V.-C., and the Court of Appeal held that a gift of realty and personalty to the widow of the testator "for the term of her natural life to be disposed of as she may think proper for her own use and benefit according to the nature and quality thereof", with a gift over of "anything remaining of the said property or any part thereof" at her death, gave the widow a life interest with an absolute power of disposition exercisable by her during her lifetime, but not by testamentary instrument, because, as Hall, V.-C., observed (at p. 147), the word "remaining" (which did not occur in the case noted) was consistent with a power of disposition other than a testamentary power. **M. E. B.**

Deed—settlement in satisfaction of covenant intended to be released—sufficiency of execution by one party upon faith of execution by other parties.—Westminster Bank, Ltd. v. *Wilson*, [1938] 3 All E. R. 652, involved an interesting point on the execution of deeds and a brief and simplified statement of the facts is all that is necessary for the purposes of this note. In exercise of an option conferred on him by an earlier deed in which he had covenanted to pay a weekly sum to the defendant, A executed an agreed form of settlement which secured similar benefits to the defendant and in which the earlier covenant by A was expressed to be released. A unconditionally delivered the deed to B, who, refusing to execute it, returned it to A. Thereupon the plaintiff bank, as trustee of the settlement and at the request of A, sold the investment comprised in the settlement and paid the proceeds of sale to A. The defendant sought a declaration from the Court that such payment constituted a breach of trust. All three members of the Court of Appeal which heard and allowed the appeal from an order of Morton, J., making the declaration asked for, reached the conclusion that the settlement was wholly inoperative, but the reasons given in the judgment of the Master of the Rolls differ

from those in the single judgment of Scott and Clauson, L.JJ., read by the latter.

It is settled law that where a party executes and delivers a deed, not as an escrow or conditionally but as his deed without any condition attached, and by that deed he is expressed to convey property, or to bind himself by covenant, the deed is effective to convey the property or to bind himself by covenant according to its terms, notwithstanding that the grantee or covenantee does not execute it. The grantee or the covenantee may respectively disclaim the grant or refuse to accept the covenant, in which case the property conveyed re-vests in the grantor or the covenantor is released, as the case may be. Sir Wilfrid Greene, M.R., was unable to find, as the other members of the Court found, on the true construction of the deed, an implied condition that the deed was to become effective and binding if and when the defendant executed it, as would have been the result of conditional delivery of the deed. Equity will, however, relieve against a deed delivered by one party on the faith that others will execute it, even if the delivery be complete and unconditional (see *Norton, Deeds* (2nd edn., 1928), pp. 20, 21) and the Master of the Rolls applied this principle to the case before him and refused to confine it to two classes of case—namely, the case where one of two or more persons who together constitute a single party does not execute the deed, and the case of sureties. The fact that the deed in the instant case conferred a benefit on a person who was not a party to it was immaterial.

In the view of Scott and Clauson, L.JJ., the settlor intended his settlement to be conditional on execution of it by the defendant, and to have no operation otherwise. Although a trust may be brought into existence by a unilateral act, as by a declaration of trust, it may also be brought into existence by a bilateral act, that is by an agreement between intending settlor and intended beneficiary, and this requires consensus of the two parties. Such a consensual creation of a trust may be achieved by parol agreement, but where, as in the present case, the proposal made by the intending settlor is that the agreement shall be by deed and not otherwise, the beneficiary's consent must be expressed by deed : *per* Clauson, L.J., at p. 662. M. E. B.

Rule against perpetuities — gift in alternative events. — In *Re Curryer's Will Trusts, Wyly* v. *Curryer*, [1938] Ch. 952, the testator provided that "on the decease of my last surviving child or on the death of the last surviving widow or widower of my children as the case may be whichever shall

last happen " his trustees were to stand possessed of his residuary estate in trust for his grandchild or grandchildren living at the date of distribution and the issue then living of his grandchild or grandchildren dying before that period. It was not, of course, disputed that a gift to a class to be ascertained on the death of the testator's last surviving child would not infringe the rule against perpetuities, but a gift to a class to be ascertained on the death of the last surviving widow or widower of the testator's children would infringe the rule, since one or more of the testator's children might marry a person who was born after the testator's death. The question was whether the use by the testator of the words " whichever shall last happen " made the gift, which would otherwise be referable to two distinct events, single in point of expression and therefore void for remoteness.

The Courts will not hold a gift over made in words comprising only one event as made on two events, although in point of fact it may consist very reasonably of two branches, unless the testator has himself so expressed it: *per* Lord St. Leonards, L.C., in *Monypenny* v. *Dering* (1852), 2 De G. M. & G. 145, at p. 183. Thus if there is an expression giving over an estate on one event, and that event will include another event which itself would be within the rule against perpetuities, it is not possible, as was observed by Sir George Jessel, M.R., in *Miles* v. *Harford* (1879), 12 Ch. D. 691, at p. 703, to split the expression so as to say if the event occurs which is within the perpetuity period the estate shall go over, although if that event does not occur the gift over is void for remoteness. But where there is a gift, for example, to A for life, and a gift over if he shall have no son who shall take priest's orders (void for remoteness) or if he shall have no son (valid), the gift over is valid and takes effect if A has no son, yet this event is included in the other event. Where there are two conditions the test is whether the testator has expressed them severally or as part of the same limitation. In *Re Curryer* (*supra*) the second event cannot be said necessarily to be included in the first, but the problem was whether the conditions formed part of one limitation. Where the testator has not himself separated limitations, the law will not separate them for him, but Morton, J., arrived at the conclusion that the testator in the case before him had expressed the events separately. He had referred to two distinct events and the fact that he went on to add the words " whichever shall last happen " was not, in the opinion of the learned Judge, sufficient to make the gift single in point of expression with a consequential infringement of the rule against perpetuities on the part of both limitations.

It may be convenient to point out that a gift to a class to take effect in possession after the death of the last surviving widow or widower would not of itself be invalid provided that the class must have been ascertained, so making the gift vested during the lives of the children of the deceased, who were, of course, lives in being under the rule. The estates or interests limited to widows or widowers would themselves be valid because they must vest within the period.

M. E. B.

Compulsory purchase of land for open spaces—assessment of compensation—betterment of adjoining land by provision of open space.—In *George Wimpey & Co., Ltd.* v. *Middlesex County Council*, [1938] 3 All E. R. 781, the defendants had acquired compulsorily from the plaintiffs land which had been partly developed as a building estate. On appeal by way of case stated from the decision of an official arbitrator, a Divisional Court found that the compensation to which the plaintiffs were entitled in respect of the land acquired was the value of the land in the open market, the expenditure thrown away in part development, and the increase of overhead charges, but not the loss sustained by them by their being deprived of builders' profits.

It was also held that in assessing the compensation in respect of the adjoining land, which was damaged by the loss of access to an arterial road, account had to be taken of its increase in value, due to the provision of the open space for which the land acquired was to be used.

M. E. B.

Highways—presumptions as to width.—In *Hanscombe* v. *Bedfordshire County Council*, [1938] 3 All E. R. 647, the defendants unsuccessfully endeavoured to justify alleged acts of trespass by adducing evidence to rebut the presumption that a ditch on the road side of a fence does not form part of a highway : cf. *Chorley Corporation* v. *Nightingale*, [1906] 2 K. B. 612; [1907] 2 K. B. 637. This presumption exists because an open ditch is *prima facie* not adapted for the exercise by the public of their right to pass and repass. On the other hand, the general presumption is that a highway extends to the boundary on either side where the highway runs between fences, unless the nature of the ground (*e.g.*, a ditch) or other circumstances (*e.g.*, the fact that the fences do not form a continuous line following the line of the highway) rebut that presumption.

Hinds & Diplock v. *Breconshire County Council*, [1938] 4 All E. R. 24, was concerned with the last-mentioned presumption in its application to the space between the *via trita* and a fence on one side only. The reason for the presumption was stated by Vaughan Williams, L.J., in *Neeld* v. *Hendon Urban District Council* (1899), 81 L. T. 405, at p. 410, to be the fact that the fences may *prima facie* be taken to have been originally put up for the purpose of separating land dedicated as a highway from land not so dedicated. The mere existence of fences on either side of the highway will be insufficient to support the presumption if there is found—as Singleton, J., was able to find in the present case—some reason for supposing that the fence by the side of the highway was put up for a different purpose. Both these recent cases merit careful reading and consideration, and it is impossible to treat them in a note with the fullness which their importance deserves.

M. E. B.

Condition—void for uncertainty—" residence ".—In view of the frequent inclusion of conditions in trusts for beneficiaries the advice of the Privy Council in *Sifton* v. *Sifton* (1938), 107 L. J. P. C. 97; [1938] A. C. 656, deserves careful attention. A Canadian testator directed that the executors should pay out of income of his residue to his daughter a sum sufficient in their judgment " to maintain her suitably until she is forty years of age, after which the whole income of the estate shall be paid to her annually "; the will proceeded as follows : " The payments to my daughter shall be made only so long as she shall continue to reside in Canada ". It was held that the later words constituted a condition subsequent. The condition could not be regarded as precedent in view of the presumption of early vesting. Nor could the gift be regarded as a conditional limitation, or, in other language, a determinable limitation. The reasons given for holding that it was a gift upon condition are worth stating in view of the difficulty sometimes felt in making this distinction. Lord Romer (at 107 L. J. P. C. at p. 104) said : " But the trusts for payment to the appellant are quite distinct from the words with which their Lordships are concerned [*i.e.*, the words of condition] and which are in a separate clause. The words do not, in their opinion, qualify the trusts for payment. They are merely designed to abrogate the trusts in a certain event. In substance, no doubt, there is not much difference between a trust to pay until the happening of a certain event and a trust to pay that is abrogated on the happening of that event.

But the legal effects in the two cases of the event being described with insufficient certainty are widely different. In the first case the trust will fail altogether. In the second case the trust will remain and it will be the clause of abrogation that will fail ".

The importance of these observations is obvious. Determinable limitations have certain very obvious advantages. The interest ceases without enforcement of the condition and it is sometimes asserted that the perpetuity rule does not operate upon the condition. The disadvantage of a determinable limitation, if there can be any doubt concerning the validity of the condition, is manifest in the passage which has been cited. No doubt the careful draftsman will weigh the respective merits of the alternative method of imposing conditions and will draft his instrument with appropriate care to ensure that no difficulty will arise on this question of construction. It is, however, essentially a matter of grammar, and, particularly in the case of wills, difficulty may occur. In law it will be a question whether the intention was for the trust to continue until the happening of a condition or was to be determinable on the happening of a condition. This can, nevertheless, only be determined by the form taken. It would seem that if a condition is imposed by a superadded clause it will be an interest upon condition, otherwise presumably it must be a conditional limitation. The superadded clause is frequently introduced by such words as " provided that " or " on condition that ", but, as in the case noted, it may be simply that the condition is in a clause that upon grammatical construction must be treated as a separate clause. Such clauses are clearly different grammatically from conditions commencing " while " or " until "; such conjunctive words can only be construed as forming part of the limitation. Doubtless there will always be cases of difficulty, but the draftsman should regard this question of grammar with great care when called upon to frame or to construe instruments containing conditions.

In the case noted it was also held that the condition was void for uncertainty. The uncertainty arose because their Lordships were unable to say " with reasonable certainty " what events would give rise to forfeiture. Lord Romer discussed the *dicta* in certain cases and adopted as a principle what Fry, J., said in *Re Exmouth*, 23 Ch. D. at p. 164 : " The condition must be clear and certain. That, in my opinion, includes not only certainty of expression in the creation of the limitation, but also certainty in its operation. It must be such a limitation that, at any given moment of time, it is ascertainable whether the limitation has or has not taken effect ". It is not certainty in the person affected, who may be

ignorant of his breach, but certainty in the sense that the Court may be able to be reasonably certain. His Lordship commented adversely upon the opinion of Russell, J., in *Re Lanyon*, [1927] 2 Ch. 264, where it was held that a condition against marriage with a blood relation was not void for uncertainty. The ground for adverse comment was that if the condition was intended to include the whole human race it would not be void for uncertainty, though bad on other grounds, but on the other hand it was clear that this was not intended and the testator had failed to specify the number of generations in which no common ancestor was to be found. Hence it was void for uncertainty.

In *Sifton* v. *Sifton* (*supra*), the difficulty presented was not dissimilar because the Court was of opinion that a temporary absence from Canada was not intended to be construed as a breach of condition. Neither of the Courts below had been able to specify exactly what temporary absences would have been outside the condition. Their inability to decide this crucial question seemed to the Board to be sufficient to show that the condition was void for uncertainty. Their Lordships took the view, and this seems to be of importance, that the cases on " residence " and " reside " associated with interests in particular dwelling houses gave no assistance in the present case, because it was normally easy to decide what was intended by the clause. The following passage from Jarman on Wills (7th ed., p. 1518), however, seems to be definitely in point : " but where no period is fixed for the duration of the residence, it is almost impossible to enforce the condition; for, on the one hand, it may be contended that the devisee must live in the house always; and, on the other, that if he constantly keeps up an establishment there it will be sufficient if he goes there only once in his life ".

It is felt that the case is worth careful attention because it is peculiarly common in testators to desire to impose conditions that may be void for uncertainty. The test is, therefore, whether at any point of time upon the construction of the condition there can be no reasonable doubt concerning compliance or non-compliance.

Mortgage—one of two joint borrowers also surety—no demand by lender for repayment—rights of surety.—Tate v. *Crewdson*, [1938] Ch. 869, was an action by one of two joint borrowers under a mortgage, who was also surety for the whole loan, for a declaration of his right to an order against his joint borrower to repay one-half of the loan on repayment of a moiety by the plaintiff. The joint loan rendered both borrowers liable as principal debtors

to the lender but a later agreement between the borrowers made each as between themselves responsible for a moiety of the loan. It was held that this agreement entitled the borrower who was surety for the whole, to the declaration sought.

The right of the surety to exoneration from liability by the principal debtor is not confined to cases where he has paid the creditor nor even to cases where he has been applied to for payment, unless the liability of the surety only accrues on demand of the creditor: *Bradford* v. *Gammon*, [1925] Ch. 132; Rowlatt, *Law of Principal and Surety* (3rd ed., 1936), p. 188. In the present case the loan was expressed in the mortgage to be repayable on demand, but Morton, J., construed the mortgage to mean that the two borrowers were under an immediate liability without demand, with the result that the case came within the principles of *Ascherson* v. *Tredegar Dry Dock and Wharf Co.*, [1909] 2 Ch. 401, and as a definite sum of money was due to the creditor, the surety had a right to have it paid by the principal and his own liability in respect of it brought to an end, although no application to the surety or to the principal debtor had been made. M. E. B.

Mortgage—right to redeem.—Knightsbridge Estates, Ltd. v. *Byrne*, noted *ante*, p. 84, has been reversed on appeal, [1938] 4 All E. R. 618, and will be discussed in the next issue.

Gifts—presumption of advancement—repayment by husband as surety.—In *Re Salisbury-Jones*, [1938] 3 All E. R. 459, Simonds, J., held that, where a husband as surety for his wife's loan on mortgage pays off the loan after demand made for repayment, there is no presumption of advancement in favour of the wife. The claim was made by the husband against the wife's estate after her death, but the point of law apparently is that where the payment is made to a third party as a legal obligation it is not an advancement *prima facie* although the wife may thereby benefit. In order that the wife could claim she must show that after the husband had made the payment he had released the liability under which she would be to her husband to indemnify him.

Arrears of tithe rentcharge—limitation of time for recovery—limitation period expiring before the commencement of excluded period—whether tithe redemption annuity is apportionable between tenant for life and remainderman.—In *Governors of Queen Anne's Bounty* v. *Tithe Redemption Commission*, [1938] 4 All E. R.

368, the Court of Appeal affirmed the decision of Morton, J. ([1938] 3 All E. R. 664) upon an originating summons which raised the construction of the Tithe Act, 1936, s. 20 (10) (a). Section 20 (1) of the Act, which (by section 1) abolished tithe rentcharge on October 2, 1936, preserved the right to recover arrears accrued due before that date, subject to the provision (sub-section 2) that after April 1, 1937, arrears were to be recoverable only by the Tithe Redemption Commission, whose right to commence proceedings for recovery is suspended until the expiration of one month from service by the tithe-owner of particulars of the arrears on the tithe-payer and on the Commission (sub-section 3). The facts admitted in the present case were that the particulars of the arrears, which had become due on October 1, 1935, had been posted by the appellants, the tithe-owners, on September 30, 1937, and were received by the tithe-payer and by the Commission on October 1, 1937, at midnight of which day (Oct. 1—2) the two years' limitation period for the recovery of tithe rentcharge under section 10 (2) of the Tithe Act, 1891, expired and at that same time there commenced the suspension period of one month, which, by section 20 (10) (a) of the Act of 1936, is excluded in the calculation of the two years' limitation period. The point at issue was whether proceedings for recovery of the arrears commenced by the Commission on November 2, 1937, were in time.

The Court, refusing to construe section 20 (10) (a) as referring to the exact time at which notices are served or proceedings begun, held that the proceedings were out of time, because the last day for bringing proceedings was November 1, 1937. Sub-section (10) (a) of section 20 refers back to sub-section 3, the true construction of which is that the month after service of the notice of particulars of the arrears is to be calculated from the midnight of the actual day of service and at that time the limitation period must not have expired if the suspension period is to be excluded from it.

In *Re Leicester's Settled Estates, Coke* v. *Leicester*, [1938] 3 All E. R. 553, Morton, J., arrived at the conclusion (though, as he admitted, with some hesitation) that the tithe redemption annuities, which section 3 of the Act of 1936 makes payable by the former tithe-payer to the Government in recoupment of the latter's expenses in compensating the quondam tithe-owner, are not apportionable as between tenant for life and remainderman of settled land and are wholly payable out of income.

Prior to the Tithe Act, 1925, the sums payable by way of tithe had to be borne by the tenant for life; the Act of 1925 created a sinking fund which, it may be (the learned Judge preferred to

express no opinion on this point, which has ceased to be of any materiality), was intended to be a burden on capital, and the Act of 1936 makes provision for an annual payment, without providing for any sinking fund at all. After referring to these facts, the learned Judge continued (at pp. 559H and 560B): "The Act provides benefits both for a tenant for life and for remainderman, assuming that the tenant for life has to bear the whole of the redemption annuity. . . . On the whole, I do not think that this is a case in which there should be any apportionment . . . between tenant for life and remainderman."

The matters dealt with in these two cases are, as the writer has endeavoured to show elsewhere, by no means the only difficulties of construction inherent in the Tithe Act, 1936, but it is useful to have decisions on these points, the second of which is of primary importance for the practitioner.

M. E. B.

Capital and income — tithe redemption annuities. — In *Re Leicester's S. E.*, [1938] 3 All E. R. 553, Morton, J., held that tithe redemption annuities were a charge on income and that no part of the annuity was attributable to capital, although the result of the payments was ultimately to discharge the land. No general principle is involved since it depends upon the nature of tithe redemption annuities under the Tithe Act, 1936, and is noted here because of its general practical importance in connection with settled land. The learned Judge was of opinion that the annual payment was not a capital charge. It seems possible that such an annual charge may fall within section 35 of the Administration of Estates Act, 1925, and a contrary intention within that section may throw the liability to discharge it onto a deceased's general estate, but this is questionable and would, it is felt, require a decision of the Court.

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2. *LANDLORD AND TENANT CASES.*

By Lionel A. Blundell, LL.M., Barrister-at-Law.

Rent Restrictions Acts—non-occupying tenant.—The Scottish case of *Menzies* v. *Mackay*, [1938] S. C. 74, should be noted as affirming once more the principle that the Rent Restrictions Acts do not afford protection to a non-occupying tenant. The tenant of a house to which those Acts applied resided there for only two weeks each year, during his summer holiday. The house

was normally unoccupied during the winter months and sublet during the summer months, although the tenant intended to live there when he retired from business. It was held by the Court of Session, following *Skinner* v. *Geary*, [1931] 2 K. B. 546; 100 L. J. K. B. 718 (C. A.), and *Hiller* v. *United Dairies (London), Ltd.*, [1934] 1 K. B. 57; 103 L. J. K. B. 5 (C. A.), that on these facts the tenant was not entitled to the protection of the Rent Restrictions Acts.

Notice to quit agricultural holding—provision for one month's notice if land required for non-agricultural purpose.—The Agricultural Holdings Act, 1923, repealing the Act of 1908, provides by section 25 that notwithstanding any provision in a contract of tenancy to the contrary, a notice to quit an agricultural holding is invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy; but this does not apply to any notice given in pursuance of a provision in the contract of tenancy authorising the resumption of possession of the holding or some part thereof for some specified purpose, unless that purpose is the use of the land for agriculture.

In *Wembley Corporation* v. *Sherren*, [1938] 4 All E. R. 255, the tenant held from year to year on the terms of a lease which provided that if the demised premises should be required for any purpose other than agricultural then the lessor could determine the demise upon giving to the lessee one calendar month's previous notice in writing, and thereupon the lease should cease and determine. The Wembley Corporation had acquired the reversion and required the land for an open space. They therefore gave the tenant one month's notice to quit.

The case appears to have been argued, for some reason not expressed in the report, on the repealed Act of 1908, s. 22. It seems clear that section 25 of the Act of 1923 validates the notice given in such a case, provided that the notice be in conformity with the clause of the lease. The further question arose here whether the notice should have been given to determine the lease at the end of a year of the tenancy. It was held by Finlay, L.J., that the clause should be read as enabling the landlord to give the month's notice at any time. "If the parties choose to do so, they may stipulate that they shall be at liberty to put an end to the tenancy by a notice expiring at any time" (*per* Lord Alverstone, C.J., in *Soames* v. *Nicholson*, [1902] 1 K. B. 157; 71 L. J. K. B. 24), and Finlay, L.J., held that the parties had

made such an agreement here. The above statement of the law by Lord Alverstone, C.J., must now of course be read as qualified by the absolute requirement of a twelve months' notice in cases where such is required by section 25 of the Agricultural Holdings Act, 1923.

It should further be observed that by section 25 (2), the requirement of a twelve months' notice does not apply to any notice given by a local authority where possession is required by the authority for the purpose (not being the use of the land for agriculture) for which it was acquired by the authority.

Landlord and Tenant Act, 1927—*compensation for goodwill in case of licensed premises—right to new lease.*—Where a tenant of licensed premises claims a new lease under the Landlord and Tenant Act, 1927, he must first show that he would be entitled to compensation for loss of goodwill under section 4. For this purpose he must show that by reason of the carrying on of the trade by him or his predecessors in title at the premises for a period of not less than five years goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realised had no such goodwill attached thereto; but the sum payable as compensation for goodwill under the section does not include any addition to the value of the premises attributable to the fact that the premises are licensed premises. The tenant must then further show that although he would be entitled to compensation under section 4, the sum which could be awarded to him under that section would not compensate him for the loss of goodwill he would suffer if he removed to and carried on his trade in other premises.

The application of the Landlord and Tenant Act, 1927, to licensed premises has already been exhaustively discussed by the House of Lords in *Charrington & Co., Ltd.* v. *Simpson*, [1935] A. C. 325; 104 L. J. K. B. 226. Now, in *Dartford Brewery Co., Ltd.* v. *Freeman*, [1938] 4 All E. R. 78, du Parcq, J. (as he then was), has applied the principles laid down by the House of Lords to a case where the tenant and his predecessors in title (a) had increased the trade of the house by inducing clubs to meet on the premises; (b) had worked up a dining room trade; and (c) had created also a body of custom so personal to the tenant that it attached to him and not to the premises. On the other hand, the business had not progressed recently as rapidly as that of other neighbouring houses.

It was held that the trade arising from the clubs meeting on the premises, and the dining room trade, were properly taken

into account in assessing compensation under section 4, and that the unfavourable comparison with the progress of neighbouring houses did not debar the claim to compensation, since the tenant and his predecessors in title had contributed an addition to the value of the premises by creating goodwill in the ways mentioned above. It seems that a corresponding or even larger decline in that part of the goodwill which is attributable to the fact that the premises are licensed premises does not take away the tenant's right to compensation in respect of the goodwill which has been created and in respect of which compensation can be claimed under section 4. This raises a point of construction of no little complexity, which did not arise in the case of *Charrington & Co., Ltd.* v. *Simpson*, and it can hardly be said that the principles governing the application of section 4 to such a case are as yet perfectly clear.

Finally, it was held by du Parcq, J., that as the goodwill which attached personally to the tenant could not be made the subject of compensation under the Act, this was a case in which a new lease ought to be granted, applying the principles laid down in *Whiteman Smith Motor Co., Ltd.* v. *Chaplin*, [1934] 2 K. B. 35; 103 L. J. K. B. 328.

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3. *WILL CASES.*

By S. J. Bailey, LL.M., Barrister-at-Law.

Administration — apportionment — direction that "income received" shall not be apportioned—exclusion of rule in Howe v. *Dartmouth—Apportionment Act*, 1870, *not excluded.*—Two questions of apportionment may arise when a testator dies, having bequeathed his residuary property to persons in succession. First, any income received by his executors in respect of periods wholly or partially antecedent to his death is ordinarily part of the corpus of the residue, in so far as it is attributable to the days before he died; and, by the Apportionment Act, 1870, section 2, the income is deemed for such purposes, to accrue from day to day unless (section 7) his will "expressly stipulates that no apportionment shall take place". Second, in so far as the income is attributable to days and periods subsequent to the testator's death and derives from hazardous or wasting personalty, it must be apportioned between capital and income as required by the rule in *Howe* v. *Dartmouth*, unless the will indicates the contrary. In *Re Bate, Public Trustee* v. *Bate*, [1938] 4 All E. R. 218, the testator left the whole of his property to trustees for sale upon

trust for persons in succession, and gave the trustees power to postpone sale and to retain any subsisting investments "notwithstanding that the property affected may be of a perishable wasting or wearing out nature". The next clause of his will was as follows: "The net profits and income received after my death from time to time of any unconverted property whatever its nature shall be applied without apportionment as if the same were income accruing after my death from the proceeds of the conversion thereof." Farwell, J., decided that this clause was merely intended to oust the rule in *Howe* v. *Dartmouth*—*i.e.*, to ensure that no part of any income accruing after the testator's death and attributable to the period subsequent to his death should be capitalised. Although the words of the clause might be read as applying to any income "received" after the death—including income received in respect of periods antecedent to the death—the learned Judge held that this was not the testator's intention. Accordingly, the clause did not operate to exclude the Apportionment Act; and such income as accrued in respect of days previous to the testator's death was therefore part of the corpus of the residue.

Administration—leaseholds comprised in settled residuary gift—rule in Howe v. *Dartmouth—effect of statutory trusts.*—That part of the rule in *Howe* v. *Dartmouth* which reduces the income payable to a life tenant under a residuary bequest of wasting personalty is now inoperative, so far as leaseholds are concerned, if the bequest of residue imposes an express trust for sale. Such was the decision in *Re Brooker*, [1926] W. N. 93. Section 28 (2) of the Law of Property Act, 1925, enacts that the rents and profits of "land" (including leaseholds) held upon trust for sale are to be applied "in like manner as the income of investments representing the purchase money would be payable or applicable if a sale had been made and the proceeds had been duly invested". The life tenant is therefore entitled to the whole of the rents and profits, pending sale, despite the wasting nature of the leasehold property. *Re Berton, Vandyk* v. *Berton*, [1938] W. N. 354; 4 All E. R. 286, carries this reasoning a stage further. A testator bequeathed his residuary property to tenants in common, subject to the payment of two-thirds of the income thereof to his widow for her life. The residuary property included certain leaseholds. Clauson, L.J., sitting as an additional Judge of the Chancery Division, decided that the leaseholds, in view of the bequest to tenants in common, became subject to the statutory trust for

sale imposed by sections 34 (3) and 35 of the Law of Property Act. Accordingly, section 28 (2) of that Act operated (as above) to protect the leaseholds from the rule in *Howe* v. *Dartmouth*, and enabled the widow to claim her full two-thirds of their income. Presumably, different considerations would have arisen had the residuary gift been expressed as a gift of the entirety to the widow for life with remainder to tenants in common; for in such a case it would seem that the statutory trust for sale would not operate until the life interest has ceased.

Administration—order of application of assets—effect of direction to pay death duties out of the estate.—Section 34 (3) of the Administration of Estates Act, 1925, enacts that "subject to the provisions, if any, contained in his will" the real and personal estate of a solvent testator shall be applied "towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout" in the order prescribed by Part II of the First Schedule to that Act. Part II of the Schedule repeats that "the order of application may be varied by the will of the deceased". In *Re Sanger*, *Taylor* v. *North*, [1938] W. N. 376; 4 All E. R. 417, a will appointed executors, bequeathed certain pecuniary legacies and annuities, devised and bequeathed the residue equally among five persons, and concluded with a direction that all duties payable on the death of the testatrix should be discharged out of her estate. Two of the shares of the residuary gift lapsed, and were therefore undisposed of by the will. Simonds, J., analysed the modern authorities and held that these lapsed shares were primarily liable, by virtue of Part II of the Schedule, to discharge the death duties (other than estate duty on the real estate) as directed by the will. It was argued that the direction in the will to discharge the death duties out of the estate showed an intention inconsistent with the provisions of the Schedule—on analogy to decisions such as *Re Petty*, [1929] 1 Ch. 726, and *Re Atkinson*, [1930] 1 Ch. 47. In those cases, however, the residue had been given to trustees on trust to convert and apply the proceeds first, for the payment of debts, and subject thereto for certain named beneficiaries; clearly, therefore, there was in each case evidence that the testator desired his debts to be paid before the shares of his residuary legatees could be ascertained. Accordingly, in those cases, all the shares of residue were diminished by the debts; and such shares as lapsed (though "undisposed of" within the meaning of the Schedule) were not primarily liable. The decision of the Court of Appeal in *Re Kempthorne*, [1930] 1 Ch. 268, was similar, as

were the facts, save that the residuary bequest there imposed no express trust to convert. On the other hand, in *Re Lamb*, [1929] 1 Ch. 722, and *Re Tong*, [1931] 1 Ch. 202, C. A., the order prescribed by the Schedule was not ousted by directions to pay debts and death duties respectively, followed by specific and pecuniary legacies and residuary gifts. Moreover, in *Re Worthington*, [1933] Ch. 771, C. A., pecuniary legacies (free of duty) followed by a residuary gift were held to be payable primarily out of a lapsed share of the residue. It is evident, therefore, that the fact that a will first directs payment of debts or death duties, before setting out the testator's benefactions, does not of itself show that the testator wished to alter the statutory order prescribed by Part II of the Schedule. Yet it would seem that such an intention will normally be deduced from indications that shares of residue are to be ascertained only after the debts or death duties have been paid.

Will—conflict of laws—capital money under the Settled Land Act, 1925—*whether "personal estate" within the Wills Act*, 1861, *s.* 1—*conversion.*—The Court of Appeal, in *Re Cartwright, Cartwright* v. *Smith*, [1938] W. N. 361; 4 All E. R. 209, has overruled the judgment of the Court below (noted *ante*, pp. 82, 102). Invested capital money arising under a strict settlement of real property is not "personal estate" within the meaning of the Wills Act, 1861, s. 1. Section 75 (5) of the Settled Land Act declares that such capital money and any investment thereof "shall for all purposes of disposition, transmission and devolution be treated as land": it therefore notionally converts the money or investment into realty. The fact that the Administration of Estates Act, 1925, introduced common rules of intestate succession applicable to both real and personal property has *not* destroyed the equitable doctrine of conversion. (This case is considered at greater length, *ante*, p. 202.)

Will—construction—"descendants"—gift of the fruit of a fund —gift of income to A B to "remain the property of the descendants of the B family".—As is well known, a devise before 1926 to A "and his descendants" was ordinarily construed as a devise to A in tail. Since 1925, however, such informal expressions are incapable of creating an entailed interest, and must be construed in the same way as they would have been before 1926 if used in a gift of personal property. Such is the effect of section 130 of the Law of Property Act, 1925. In *Re Brownlie, Brownlie* v. *Muaux*, [1938] 4 All E. R. 54, a testatrix bequeathed "to

L. Brownlie the life interest in my holding of War Loan of £9 a week", and added "this life interest will remain the property of the descendants of the Brownlie branch of the family until extinct". Simonds, J., concluded from these words that the "descendants" referred to were not confined to the descendants of L. Brownlie himself. Accordingly, the words were not such as would have conferred upon him an entail in real property under the old law. Consequently section 130 was inapplicable. Further, the learned Judge did not agree that this bequest of the £9 a week of the War Loan was intended as a gift of the income to the legatee indefinitely. The rule of construction whereby an indefinite gift of the fruit of a fund operates as a gift of the tree which produces that fruit (see *Re L'Herminier*, [1894] 1 Ch. 675) was therefore inapplicable. Consequently the bequest to R. Brownlie conferred upon him a life interest only.

Will—construction—perpetuity—discretion restricted to "the limitations prescribed by law"—analogy to special power of appointment.—In *Re Vaux, Nicholson* v. *Vaux*, [1938] 4 All E. R. 297, the Court of Appeal has overruled one aspect of the decision of Simonds, J., in the Court below (noted *ante*, Vol. II, p. 384 B). By clause 11 of his will, a testator directed his trustees to apply both the income and the capital of a fund, in such shares as they should think fit, for the benefit of any one or more of his children *or the issue of any deceased child*. By clause 12, he empowered them to deal with the capital and income thereof for the benefit of his children or *grandchildren* at their sole discretion "save only that all such dealings shall be within the limitations prescribed by law". Clause 11 infringed the rule against perpetuities, for it purported to give to the trustees (defined by the will to include the trustees for the time being, whether original *or substituted*) a discretion, in the nature of a special power of appointment, exercisable at any future time by trustees who would not necessarily be ascertained within the perpetuity period. As for clause 12, Simonds, J., had construed it as a particular authority falling within the larger ambit of clause 11, and had therefore held that it was incapable either of restricting the remoteness of clause 12 or of standing alone as an independent clause. The Court of Appeal, however (*per* Clauson, L.J.), construed clause 12 as an independent clause and held it to be valid in itself. Although it purported to give a discretion exercisable by future trustees throughout the lives of the testator's children and grand-

children (including, *semble*, grandchildren born after his death), its final words, by restricting this discretion to "the limitations prescribed by law", prevented it from being too remote. The Court dissented from a *dictum* of Simonds, J., to the effect that these saving words were void for uncertainty for want of any indication of the life or lives in being intended to be associated with the "limitations prescribed by law". The proper view to take in such a case is that the discretion, being in the nature of a special power of appointment given by the will, must be construed as one would construe a testamentary special power of appointment. The validity of any appointment under such a power would ordinarily be tested by ascertaining whether the interest appointed would have been too remote had it been given by the will which conferred the power. It is thus possible, without any uncertainty, to test for remoteness any exercise of a testamentary special power of appointment. Accordingly, it is equally possible, without any uncertainty, to ascertain whether the trustees, when exercising the discretion conferred upon them by clause 12, are exercising it "within the limitations prescribed by law".

Will—covenant not to revoke—whether actionable on revocation by remarriage of testator—general restraint of marriage.—It is settled law that a testator may lawfully covenant not to revoke his will. In *Robinson* v. *Ommanney* (1882), 21 Ch. D. 780, Kay, J., held that such a covenant is not wholly void, although one of the possible modes of revoking a will is marriage; accordingly he decided that a covenant not to revoke, entered into by a spinster testatrix, would be actionable in damages if she revoked her will otherwise than by marrying. In *Re Marsland, Lloyds Bank, Ltd.* v. *Marsland*, [1938] 4 All E. R. 279, a husband and wife entered into a deed of separation wherein the husband covenanted not to revoke a will made in favour of the wife and their children. Subsequently, the wife having died, the husband remarried and then made another will, less beneficial to the children of his former marriage. Farwell, J., held that the husband's remarriage was what revoked the former will: the covenant not to revoke was therefore unenforceable; for, on the facts, the covenant had become, in effect, a covenant in general restraint of marriage and contrary to public policy. It would therefore appear to follow that the distinction which is sometimes made between covenants in restraint of first marriage and those in restraint of *remarriage* is inapplicable to a covenant not to revoke a will.

4. *INCOME TAX CASES.*

By L. J. Stein, Barrister-at-Law.

[The decisions selected for notice are not necessarily those of the greatest importance from the standpoint of the income tax practitioner, but those most germane to the matters with which *The Conveyancer* is primarily concerned.]

Income tax, Schedule D — trading by executor. — Newbarns Syndicate v. *Hay*, Tax Leaflet 966; 17 A. T. C. 308, read together with the earlier decision in *Marshall's Executors, etc.* v. *Joly*, 20 T. C. 256, serves to illustrate the tests by which it will be decided whether an executor is or is not carrying on, or joining in carrying on, a trade. In both cases the question was essentially one of fact. In the *Newbarns Syndicate Case*, above, the deceased had been a member of a syndicate formed in 1916 for the purpose of acquiring and re-selling land. Before the death of the deceased various purchases and sales had been effected by the syndicate. The deceased died in 1921, and the main question which arose was whether after his death a trade was carried on by a syndicate of which his executor fell to be treated as a member. There were in fact sales of land in 1922, 1929, 1930 and 1935, and even then there still remained some land to be disposed of. So far as the executor was concerned, it was contended that he was merely engaged in the realisation of assets, and that the length of the period over which the realisation extended was accounted for by the inexpediency of forcing sales in an unfavourable market. In deciding that there was evidence on which the Commissioners were entitled to find that after the death of the deceased the executor was engaged in a trade together with the surviving members of the original syndicate, Lawrence, J., laid stress on the length of the interval which had elapsed since the death. In *Marshall's Executors, etc.* v. *Joly*, above, the operations of the syndicate into which the executors had been introduced were concluded within about three and a half years from the death of the testator, whereas in the present case the testator had died in 1921 and as late as 1935 some of the property was still in hand.

[This case is understood to be under appeal.]

Surtax—interim income of property held on trust for individual on attaining a specified age.—The decision in *C. I. R.* v. *Abbey*, Tax Leaflet 985, turned on the construction of a declaration of trust to the effect that certain shares were held on trust for A "if and when she shall attain the age of twenty-five years

absolutely " and " subject as aforesaid, in trust for B absolutely ", no express reference being made to the income of the trust property. If there had been simply a declaration of trust for A on attaining twenty-five, with a gift over in the event of her not attaining that age, it was clear that the trustees would have had to accumulate the income for A. Could it then be said, as the Crown contended, that this was not how the declaration of trust was to be understood, and that the effect of the words " subject as aforesaid " was to give to B every interest in the property (including the interim income) not given in trust for A? Lawrence, J., took the view that the true construction of the declaration of trust was not that B was entitled to the property subject to defeasance if A attained twenty-five, but that B's only interest was an interest contingent on A's failing to attain twenty-five, from which it followed that the interim income was not the income of B but was income required to be accumulated for the benefit of A.

[This decision has been affirmed on appeal.]

Penalties—executor's liability.—The decision in *Att.-Gen.* v. *Canter* (see note *ante*, p. 108) has now been affirmed on appeal—see *The Times* newspaper, December 20, 1938.

L. S.

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5. *DEATH DUTY CASES.*

By L. J. STEIN, Barrister-at-Law.

Estate duty—accumulations.—Where estate duty is chargeable in respect of settled property on the death of a settlor, are accumulations of income under the settlement to be considered to be aggregable under section 4 of the Finance Act, 1894, for the purpose of determining the rate of duty, even though the settlor had parted with all beneficial interest in the property before the accumulations began? In *Att.-Gen.* v. *Lloyds Bank*, [1935] A. C. 382, it was conceded by the Crown, when the question was raised before Finlay, J., that such accumulations did not fall to be aggregated. It was subsequently stated that this admission had been made *per incuriam*, but the Crown naturally refrained, in the circumstances, from seeking to re-open the question when the case went further. The next case in which the point arose was *Att.-Gen.* v. *Dickinson*, [1937] 2 K. B. 574 (see note in *The Conveyancer*, June, 1937, at p. 380), where it was held that the accumulations were aggregable. A different conclusion on what seems, at first sight, to be the same point was reached by Farwell, J., in *Re Hodson's Settlement, Brookes* v. *Att.-Gen.*,

[1938] Ch. 916. But there was, in fact, a material distinction. In *Dickinson's Case*, above, it was admitted on behalf of the subject that the accumulations were property passing on the death of the deceased within the meaning of section 1 of the Finance Act, 1894, and the case was decided on that footing. In *Hodson's Case*, on the other hand, it was held that there was not a passing under section 1, but a notional passing under section 2 (1) (d). Now, what is deemed to pass under section 2 (1) (d) is an annuity or other interest provided by the deceased to the extent of the beneficial interest accruing or arising on his death; and, the question to be answered under section 4 being whether this could be said to be property in which the deceased ever had an interest, Farwell, J., held that the answer was clearly that it could not. Accordingly, the learned Judge decided that *Dickinson's Case*, above, was distinguishable, and that, on the view which he took of the section under which the duty was chargeable, the rate must be determined on the footing that the accumulations were not to be aggregated but formed an estate by itself.

Estate duty—allowance for funeral expenses and debts.—A novel estate duty point was raised and disposed of in *Re Barnes*, [1938] 2 K. B. 684. The deceased had made large gifts *inter vivos* within three years of his death. He died almost penniless and with heavy debts. It was contended by his executrix that the value of the property deemed to pass by virtue of the gifts within the three years' period should, under section 7 of the Finance Act, 1894, be reduced by the amount of the funeral expenses and debts. This reading of section 7 was rejected by Lawrence, J., who pointed out that it was inconceivable that an allowance could be made for debts beyond the value of the assets out of which the debts were to be met.

Succession duty—effect of variation of settlement by private Act of Parliament.—It is not necessary to set forth in detail the somewhat complicated facts in *Att.-Gen.* v. *Glyn Mills & Co.*, [1938] 3 All E. R. 605, in order to bring out the main point of interest in the decision. The deceased had, under a settlement, a life interest in the settled property, subject to forfeiture on alienation. His eldest son had power to charge the property with the payment of a certain sum after the death of the deceased in the event of the son's surviving the deceased. It was subsequently provided by a private Act of Parliament that the power to charge might, with the consent of the deceased, be so exercised as to take effect after the death of the deceased irrespective of whether the

son did or did not survive him, and it was further provided by the Act that, notwithstanding the forfeiture clause in the settlement, the deceased might release his life interest in any sum so charged. Certain sums were raised under the power to charge and paid to the son during the lifetime of the deceased, who released his life interest so as to enable the payments to be made. On these facts succession duty was claimed, on the death of the deceased, on the sums so raised and paid to the son during his lifetime, the relevant section of the 1853 Act being section 15, which provides (*inter alia*) that where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, the duty shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place. It was held that section 15 applied, since the private Act, though it enabled the son's title to the succession to be accelerated, did not thereby get rid of the succession. The Act did not of itself dispose of the property. It merely gave the parties certain powers which they could exercise or not as they chose, and the deceased had accelerated the son's succession by surrendering his life interest within the meaning of section 15. A distinction was drawn between the facts of this case and those of *Lord Advocate* v. *Jamieson* (1886), 13 R. 737, where, a debtor having settled property on trust primarily for the payment of his debts, and, subject thereto, on certain trusts for the benefit of his family, a private Act was subsequently passed to authorise an arrangement by which the creditors agreed to certain payments being made to the beneficiaries while the trust for payment of debts was still subsisting. That case was decided on the footing that the payments in respect of which succession duty was claimed were not payments made by reference to the original disposition, but were, in reality, mere gifts *inter vivos* by the creditors. In *Glyn Mills' Case*, above, on the other hand, the raising of the payments was authorised by the settlement, and the only effect of the private Act was to enable the title to the succession to be accelerated by the surrender of the deceased's life interest.

THE LIBRARY.

Gibson's Conveyancing. Fifteenth edition. By Arthur Weldon, H. Gibson Rivington, M.A., and J. F. R. Burnett. London: Law Notes Lending Library, Ltd., Chancery Lane. 1938. cvii and 766 pp. (£2.)

So many practitioners have been brought up upon "Gibson" and have naturally continued to use it in their practice that a new edition

needs no introduction. The form and character of its contents must be familiar to nearly all, if not all practitioners. To those, if any, who do not know it we commend it to their attention as, perhaps, the clearest summary and compendium of the law of conveyancing within its compass that has been written. It must be recalled that the work was originally written as a student's textbook and it is only the character of the Solicitors' Final Examination and the care of the authors to incorporate most of the new cases and legislative provisions which make it a concise and convenient reference book in practice, containing at least an indication of the answer to the usual questions arising.

The accuracy of this work is so well known that it calls for no comment. We have checked it up on a large number of more recent cases and have found that most of them have been incorporated. Omissions are largely a matter of opinion in a work of this character and we do not propose to air an assumed erudition by enumeration. We may mention surprise at the omission of *Re Beaumont's S. E.*, [1937] 2 All E. R. 353 (see *ante*, Vol. I, p. 359) and *Re Liberty's Will Trusts*, [1937] Ch. 176 (see *ante*, Vol. I, p. 268), because it illustrates a difficulty of the authors. These cases affect settled land. The first contains possibilities concerning the interpretation of "binding" trust for sale and the latter may affect the true construction of the relation between estate ownership and beneficial interests which are fundamental in this branch of the law. They are theoretical questions, which may have considerable consequences, but in order to keep a book of this kind within bounds it is difficult to deal with such points clearly without perhaps disproportionate space. We find that other cases of interest have, similarly, to be incorporated by a bare reference which does no more than put the reader on notice of their existence: *e.g.*, *Re Leighton's Conveyance*, [1936] 1 All E. R. 617 (see note on case in appeal, Vol. I, p. 361); *Iron Trades, etc.* v. *Union of House, etc.*, [1937] Ch. 313 (see Vol. I, p. 363). If the examiners required less detail on comparatively minor points no doubt the authors could find room for an expression of their views, which would be welcome, and it is thought that practitioners might find the work even more valuable. Experience points to the view that it is some of the larger issues which more frequently give rise to difficulty in practice than the smaller details, which in any event generally appear in the footnotes to precedent books.

If we may hazard a criticism on two points it must not be taken to lessen our appreciation of a most useful book. First, in one or two places, we suspect primarily where no drastic alteration has been made by the Property Acts, continuous revision has left a patchwork which hardly reaches the general high standard of excellence. For example, Appointments under Powers should in our opinion be largely rewritten. It is not always clear whether powers generally or powers of appointment (in the more restricted sense) are intended to be covered by what is said; the distinction between a power void for perpetuity and the exercise of the power void for the same reason appears to be inextricably mixed; the distinction between general and special powers, here and elsewhere in the book, is relied on as exclusive except for a paragraph which states that there may be a third class of power. It is suggested that this section might also include the exercise of powers by will, etc., appearing elsewhere in the book, which might simplify treatment. Another place requiring drastic treatment, in our opinion, is restrictive covenants. Both these subjects are of first-class practical importance and everyday occurrence,

and consequently deserve the most careful treatment in light of their intrinsic difficulty.

Secondly, the section on Registered Land should be omitted or entirely rewritten. This is a subject of great and increasing importance to practitioners throughout the country and many of them are virtually in the position of students. Leaving aside the rather numerous difficulties of interpretation which this legislation provides and which generally the authors seem to regard as outside their province, the student, whether or not he be a practitioner, needs to know not only what the Act and Rules provide, if anything, in relation to the well-recognised conveyancing transactions, but also what parts of the ordinary law are applicable and what additional provisions, if any, are necessary outside the provided forms, and also in what respects real difference exists between the registered and unregistered system. We do not think that in the space the authors seem to regard as available that this can be done without excision of much of the detail now given, and in the present state of the Solicitors' Final Examination they may not be justified in doing more. We can only say that in our opinion, from the practitioner's point of view, this is much the least valuable part of the book.

Let us end by congratulating the authors on maintaining their previous high standard.

Gibson's Probate Law. Thirteenth edition. *Gibson's Divorce Law.* Thirteenth edition. Both by Arthur Weldon, Solicitor, and L. Crispin Warmington, Solicitor. London: Law Notes Lending Library, Ltd. (Price for both 25*s.*, or 15*s.* each.)

First, there was a Probate, Divorce and Admiralty, then there was a Probate and Divorce, and now Probate and Divorce appear in separate volumes. From a practitioner's point of view this may be a convenience since both volumes may not be required in the exigencies of a practice, but either would be useful. The work on Probate Law is very familiar to most generations of solicitor practitioners to-day and calls for no real comment. For most practitioners a probate action is a rare thing and we can say from practical experience that the outline given in this book provides a working basis to steer the litigant into the arms of counsel upon the correct course. A handy book that may make it unnecessary to purchase a more expensive work since it will prove a suitable guide.

The Divorce Law represents something new and is rather out of the ordinary course of what used to be called "the Students'" series before they took the more individualistic cloak of "Gibson's". Here the learned authors have taken upon themselves something of the mantle of prophets and we would offer them a hearty welcome in this sphere. The Matrimonial Causes Act, 1937, was a short Act, but it is big with future possibilities. Lawyers are apt to look askance at little statutes on large subjects for they tend to leave too much for the Courts to decide. This Act is shown by the learned authors to be no exception to this principle. They have given acute analysis of the problems afforded by the new legislation combined with a very clear exposition of the various grounds of and defences to divorce and separation. Practitioners will find this volume most helpful in the solution of those unhappy cases of matrimonial difference which fall to their lot. The book is both practical and interesting and we offer it a warm welcome in its new form.